Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TOWN OF GRAY, and
REGIONAL WASTE SYSTEMS, INC.,
Petitioners,

v.

TRI-STATE RUBBISH, INC., and
RECYCLABLES UNLIMITED SERVICES, INC.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the State of Maine

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a local police power ordinance enacted in compliance with federal and state law, directing a town's municipal solid waste to a designated regional waste-to-energy facility, is permissible under the Commerce Clause.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Decision of the Maine Supreme Judicial Court was rendered on October 15, 1993. That Decision is recorded at No. CUM-93-45, Decision No. 6654, (Me. Oct. 15, 1993), is now reported at 632 A.2d 134 (Me. 1993) and is reproduced at pages 1a-6a of the appendix to this petition ("Pet. App.").

The Order of the Maine Superior Court (Cumberland County) granting Petitioners' Motion for Summary Judgment was rendered on January 26, 1993, is unreported and is reproduced at Pet. App. 8a-10a.

The transcript from the January 12, 1993 hearing on Petitioners' Motion for Summary Judgment in the Maine

Superior Court (Cumberland County) is unreported and is reproduced at Pet. App. 11a-46a.[1]

JURISDICTION

The Decision of the Maine Supreme Judicial Court was issued on October 25, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1257(a) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the United States Constitution, Art. I, sec. 8, cl. 3, provides in pertinent part: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .".

2. The Tenth Amendment to the United States Constitution, amend. X, provides:

   "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. Resource Conservation Recovery Act ("RCRA")

   a. 42 U.S.C.A. § 6901(a)(4) (West 1983) provides that:

      The Congress finds with respect to solid waste— . . . that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and applica-

[1] All parties to the proceeding below are listed in the caption. There are no parent companies or non-wholly-owned subsidiaries to be listed pursuant to Rule 29.1 of this Court.

tion of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices.

b. 42 U.S.C.A. § 6943(a)(5) (West 1983) provides that:

> In order to be approved under Section 6947 of this title, each State plan must comply with the following minimum requirements— . . . The plan shall provide that no State or local government within the State shall be prohibited under State or local law from negotiating and entering into long-term contracts for the supply of solid waste to resource recovery facilities, from entering into long-term contracts for the operation of such facilities, or from securing long-term markets for material and energy recovered from such facilities or for conserving materials or energy by reducing the volume of waste.

4. The Maine home rule statute, 30-A M.R.S.A. § 3001 (West Supp. 1993), provides:

> Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.
>
> 1. Liberal Construction. This section, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect its purposes.
>
> 2. Presumption of authority. There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality's home rule authority.
>
> 3. Standard of preemption. The Legislature shall not be held to have implicitly denied any power

granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.

4. Penalties accrue to municapility. All penalties established by ordinance shall be recovered on complaint to the use of the municipality.

5. The Maine flow control enabling legislation, 38 M.R.S.A. § 1304-B (West 1989 and Supp. 1993), is reproduced at Pet. App. 66a-74a.

6. The Maine solid waste disposal mandate statute, 38 M.R.S.A. § 1305(1) (West 1989), prior to 1989 read as follows:

> Disposal facilities. Each municipality shall provide a solid waste disposal facility for domestic and commercial solid waste generated within the municipality and may provide such a facility for industrial wastes and sewage treatment plant sludge.

Subsequent to 1989, § 1305(1) (West Supp. 1993) reads:

> Disposal services. Each municipality shall provide solid waste disposal services for domestic and commercial solid waste generated within the municipality and may provide these services for industrial wastes and sewage treatment plant sludge.

7. The State solid waste management hierarchy statute, 38 M.R.S.A. § 2101 (West Supp. 1993), reads:

1. Priorities. It is the policy of the State to plan for and implement an integrated approach to solid waste management, which shall be based on the following order of priority:

A. Reduction of waste generated at the source, including both amount and toxicity of the waste;

B. Reuse of waste;

C. Recycling of waste;

D. Composting of biodegradable waste;

E. Waste processing which reduces the volume of waste needing land disposal, including incineration; and

F. Land disposal of waste.

8. The Maine solid waste recycling goals statute, 38 M.R.S.A. § 2132(1) (West Supp. 1993), reads:

1. State recycling goal; interim goal. It is the policy of the State to recycle, by January 1, 1994, 50% of the municipal solid waste generated each year. The Legislature establishes an interim goal of recycling, by January 1, 1992, 25% of the municipal solid waste generated each year.

9. The Maine municipal disposal surcharge; recycling and import fees statute, 38 M.R.S.A. § 2204 (West Supp. 1993), reads:

The agency shall impose the following fees.

1. Landfill surcharge. A disposal surcharge of $4 per ton is assessed on any municipal solid waste disposed of by landfilling at a commercial landfill facility.

2. Recycling progress. Any municipality that fails to make reasonable progress, as determined by the agency, toward the state recycling goals shall pay a $1.50 per ton fee on:

A. Any solid waste generated within its jurisdiction that is exported from the State; and

B. Any solid waste generated within its jurisdiction that is delivered to a commercial solid waste facility or to a solid waste disposal facility owned by the agency or a regional association, except tires disposed of in a manner other than landfilling.

3. Imported municipal solid waste. To support those regulatory and administrative costs associated with imported municipal solid wastes, an administrative fee of $4 per ton is assessed on any municipal solid waste originating outside the State and delivered to a commercial solid waste disposal facility or solid waste disposal facility owned by the agency or a regional association for disposal.

10. The Maine Constitution's home rule provision, Me. Const. art. VIII, pt. 2, sec. 1, reads:

> The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.

11. The Town of Gray, Maine's Solid Waste, Flow Control and Recycling Ordinance ("Flow Control Ordinance") is reproduced at Pet. App. 47a-65a.

STATEMENT OF THE CASE

This case presents a waste hauler's challenge under the dormant Commerce Clause to the validity of Petitioner Town of Gray's (the "Town") Solid Waste, Flow Control and Recycling Ordinance (the "Flow Control Ordinance"). The Flow Control Ordinance requires all solid waste generated within the Town to be disposed of—either directly or through the Town's transfer station—at a waste-to-energy facility (the "Facility") owned and operated by Petitioner Regional Waste Systems, Inc. ("RWS") located in Portland, Maine. RWS is a non-capital stock, non-profit corporation composed of twenty-one Maine municipalities (the "Member Municipalities")[2] for the purpose of providing them and ten asso-

[2] RWS' Member Municipalities include the following: Bridgton, Cape Elizabeth, Casco, Cumberland, Falmouth, Freeport, Gorham,

ciate member municipalities with a long-term, environmentally advanced method for meeting their state-mandated solid waste disposal and management obligations.[3]

A. Background

Between 1973 and 1989, Maine's Legislature directed that each municipality provide solid waste disposal facilities for the waste generated within its boundaries. In 1973, the Legislature enacted P.L. 1973, c. 387, which stated that each Maine "municipality shall provide a solid waste disposal facility for domestic and commercial solid waste generated within the municipality . . . ;" this Maine Public Law is codified in part at 38 M.R.S.A. § 1305(1) (West Supp. 1993). The statement of fact to the Legislative Document that was enacted as P.L. 1973, c. 387, reads in pertinent part: "This Act also requires municipalities to assume responsibility for the orderly disposal of solid waste except that generated by industry and waste water treatment sludge." *See* L.D. 1903, Statement of Fact (106th Maine Legislature 1973). Pet. App. 75a-81a. For the next sixteen years, § 1305(1) remained

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Gray, Harrison, Hollis, Limington, Lyman, North Yarmouth, Ogunquit, Portland, Pownal, Scarborough, South Portland, Waterboro, Windham and Yarmouth.

[3] Prior to commencement of operations of the Facility, landfilling was the primary means of solid waste disposal for all the Member Municipalities. Currently, through RWS, the Member Municipalities have initiated a comprehensive solid waste management plan, providing not only cogeneration at the Facility, but also recycling services with containers owned and collected by RWS and available in all the Member Municipalities, landfilling for by-pass waste at a landfill owned by RWS, disposal of ash residue from the Facility at an ashfill owned by RWS, composting of yard waste from Member Municipalities, undertaking of a sludge disposal facility in conjunction with the City of South Portland and the Portland Waster District (which services the majority of Member Municipalities), and providing educational services for schools and community organizations.

unchanged and mandated that each municipality provide a solid waste disposal facility.[4] During the time that this mandate existed, the Member Municipalities studied the need for a regional solid waste disposal facility, and constructed the Facility in order to meet the mandate of § 1305(1).[5]

The Town adopted the predecessor ordinance to the Flow Control Ordinance as a condition of its participation in RWS and to help ensure the viability of the Facility. The Facility, which began operation in 1988, relies upon approximately $105 million in revenue bonds issued by RWS, which are repaid from revenues resulting from the sale of electricity and from tipping fees paid by Member Municipalities, associate member municipalities and by commercial waste haulers for the disposal of solid waste.

An essential precondition to the availability of sufficient tipping fee revenue and electrical generation revenue is a reliable supply of solid waste as fuel. Therefore,

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[4] In 1989, § 1305(1) was amended so that each municipality's obligation now is to provide "disposal services" rather than a "disposal facility." *See* P.L. 1989 c. 585, § 17, codified at 38 M.R.S.A. § 1305(1) (West Supp. 1993).

[5] The Member Municipalities and RWS decided to construct the Facility only after lengthy and careful evaluation of alternative solid waste disposal methods to determine which would best promote the local public health and environmental interests. *See*, Feasible Solid Waste Disposal Alternatives for Greater Portland/Cumberland County, Maine, Report of Joint Greater Portland Council of Governments/RWS Solid Waste Management Policy Comm. (1983). This report concludes, based on "a careful evaluation of both resource recovery and nonresource recovery systems," that resource recovery (waste-to-energy) is "economically and environmentally preferable [to] all the practical resource recovery and nonresource recovery solid waste alternatives practically available" *Id.* at 1-1 through 1-3. The same report further concludes that "[c]ontrol over the supply of waste to a resource recovery facility or other capital intensive solid waste disposal system is essential to facility development." *Id.* at 2-17.

RWS entered into a Waste Handling Agreement with each Member Municipality requiring each municipality to pledge all of the "Acceptable Waste" (defined in Section II of the Flow Control Ordinance in part as "ordinary household, municipal, institutional, commercial and industrial solid waste") generated within its borders to RWS (and to such facility as RWS may designate). Pet. App. 49a. The Waste Handling Agreement also requires each municipality to adopt a solid waste flow control ordinance designating the Facility as the disposal facility for all such Acceptable Waste. Thus, in 1985, consistent with this requirement of the Waste Handling Agreement and with a Maine statute (38 M.R.S.A. § 1304-B (West 1989 and Supp. 1993)) authorizing enactment of flow control ordinances, the Town adopted its first flow control ordinance.[6]

Pursuant to its statutory home rule authority under Me. Const. art. VIII, pt. 2, sec. 1 and 30-A M.R.S.A. § 3001 (West Supp. 1993) and in response to the Maine Legislature's adoption of state recycling goals and to the escalating local cost of solid waste management, the Town in 1992 replaced its initial flow control ordinance.[7]

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[6] In accordance with Rule 29.4(c), Petitioners note that this case could be viewed as drawing the constitutionality of a Maine state statute into question and that 28 U.S.C.A. § 2403(b) (West 1978) may be applicable. The statute involved is enabling legislation, 38 M.R.S.A. § 1304-B (West 1989 and Supp. 1993), to adopt local flow control ordinances.

[7] In 1987, Maine's Legislature enacted a system of statewide solid waste management (P.L. 1987, c. 517), and in 1989, it established a state administrative agency, the Maine Waste Management Agency, to oversee local and regional solid waste management efforts. The legislation establishing that agency (P.L. 1989, c. 585, codified at 38 M.R.S.A. § 2101-2236 (West Supp. 1993) reproduced in pertinent part herein) also set forth a hierarchy of solid waste management which favors incineration of solid waste over its disposal in landfills. *See* 38 M.R.S.A. § 2101 (West Supp. 1993). It also establishes the state's goal to recycle 25% of the municipal solid waste generated each year by January 1, 1992 and 50% by

The preamble to the replacement Flow Control Ordinance demonstrates these two purposes for its adoption: the fourth paragraph concludes that "the Town of Gray wishes to encourage reduction, recycling and reusing [of solid waste] to the maximum extent possible," and the seventh paragraph states the Town Council's desire "to provide adequate, efficient service and facilities for the disposal of solid waste without creating an undo [sic] financial burden on property owners." Pet. App. 47a-48a. Also, the sixth paragraph of the preamble sets forth the underlying purpose for both the Flow Control Ordinance and the RWS waste-to-energy management system: "The Council desires to gain management control over solid waste and enable the reclamation of resources, including energy, from those wastes." Pet. App. 48a. The Flow Control Ordinance, in Sections III(A) and (C), IV, VI(E), and VII(D), (G) and (H), also requires all waste generated in the Town to be delivered to the Facility (either directly or through the Town's transfer station), and also requires recyclable waste separated from other solid waste by commercial haulers to be delivered to the Town's transfer station. Pet. App. 55a-62a.

B. Proceedings Below.

Respondents Tri-State Rubbish, Inc. ("Tri-State") and Recyclables Unlimited Services, Inc. ("RUSI") objected to the Flow Control Ordinance's provisions for the following reasons: (1) commercial haulers had to dispose of all solid waste generated in the Town at RWS at their own expense, and (2) all recycling had to be conducted through the Town. Respondent Tri-State, which is the entity actually collecting and disposing of solid waste in the Town, alleged in a Verified Complaint signed by its President, Guy Hart, that it transported the recyclable materials collected within the Town to RUSI—a corpora-

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January 1, 1994, and imposes a financial penalty on municipalities that fail to make reasonable progress toward this goal. 38 M.R.S.A. §§ 2132(1), 2204 (West Supp. 1993).

tion also headed by Guy Hart—which operates a waste facility in the town of West Paris, Maine. There, RUSI allegedly separated recyclable materials for recovery, processing and sale and then transported the residual solid waste to a waste-to-energy incinerator facility in Maine other than RWS with a tipping fee lower than that charged by RWS.

Respondents filed their Verified Complaint in the Maine Superior Court, seeking: (1) a declaratory judgment that the Flow Control Ordinance violates the Commerce Clause of the U.S. Constitution, denies equal protection of the laws afforded under the state and federal constitutions, results in impairment of contract and violates both state and federal antitrust laws; (2) preliminary and permanent injunctive relief requiring the Town to pay the tipping fees that Respondents now must pay for use of the RWS Facility and to allow Respondents to process and sell recyclable materials; and (3) damages, attorney's fees and costs under state and federal civil rights statutes. Respondents also filed a separate motion for preliminary and permanent injunction.

Petitioner Town filed with its Amended Answer a three-count Counterclaim alleging the following violations of the Flow Control Ordinance by the Respondents: (1) failure to obtain a commercial hauler's license, (2) diversion of recyclable materials, and (3) diversion of solid waste. Petitioner Town filed a motion for summary judgment on all its counterclaims and Petitioner RWS moved to intervene. The Superior Court, after a hearing on all pending motions, approved RWS' intervention, granted Petitioners' motion for summary judgment on their counterclaims, denied Respondents' cross-motion for summary judgment, and entered judgment instead for Petitioners on all counts of the Verified Complaint. Pet. App. 8a-10a.

At the hearing on these motions, the Superior Court noted the traditional role of municipalities in providing

solid waste management services and denied the Respondents' Commerce Clause claim:

> . . . I begin with the proposition that this area of solid waste has been traditionally, for decades, an area where the municipality has had a great deal of authority to regulate, and to regulate in ways that have traditionally been monopolistic. I recently looked at some very old Maine cases going back to the turn of the century, where some of the very same arguments that you're raising now were raised about the authority of the town to basically grant a monopoly to a private enterprise to deal with offal and swill, as they called it then. And the Law Court was very clear that, in the town's exercise of its police power, that it could, in effect, grant a monopoly to a business to carry out the function of disposing of the offal and the swill.
>
> . . .
>
> In terms of the commerce clause issues, I just—I mean, I recognize the grand scope of the commerce clause, and I'm reluctant to say that what the Town is doing does not have some effect on interstate commerce. But I can't imagine that what the Town is doing is having such an effect on interstate commerce that it violates applicable constitutional standards. The point is, again, that it does require, to some extent, that they control the destination of the waste. And in that sense, yes, it restricts the free flow of commerce, taking the view, as you have, correctly, that waste is a commodity. Clearly, it is. And I believe, for all the reasons I've already stated, they can control the destination of that waste, and they're doing it for perfectly legitimate and rational reasons.

Pet. App. 37a-38a.

Respondents then appealed to the Maine Supreme Judicial Court, sitting as the Law Court (the "Law Court"). The Law Court affirmed the Superior Court's decision as to all issues except the Respondents' Commerce Clause

claim.[8] With regard to the Commerce Clause claim, the Law Court held that there existed a genuine issue of material fact, and ordered the case remanded to the Superior Court. However, it also held that the Flow Control Ordinance is not *per se* invalid under the Commerce Clause and:

> Rather, [that] Gray's Ordinance appears to pursue legitimate local goals, by gaining control of the waste stream and promoting recycling and energy recovery. The Ordinance, however, has a discriminatory effect on interstate commerce by prohibiting waste that would otherwise be available for interstate trade from crossing the state line. *Waste Systems Corp. v. County of Martin*, 784 F. Supp. 641, 645 (D. Minn. 1992). Gray and RWS must therefore show valid reasons for this Ordinance other than economic protectionism and must also show that reasonable alternatives to the Ordinance are unavailable. (citations omitted.

Tri-State Rubbish, Inc., et al. v. Town of Gray, No. CUM-93-45, Decision No. 6654, slip op. at 6 (Me. Oct. 15, 1993). Pet. App. 6a.

This Petition challenges the Law Court's holdings: (1) that the Flow Control Ordinance has a discriminatory effect on interstate commerce, (2) that Petitioners bear the burden of showing that reasons for the Flow Control Ordinance exist other than economic protectionism and that reasonable alternatives are unavailable, and (3) that the dormant Commerce Clause is applicable to the Flow Control Ordinance. These issues of law are raised now because they directly affect the conduct of proceedings on remand.

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[8] *Tri-State Rubbish, Inc. v. Town of Gray*, No. CUM-93-45, Decision No. 6654 slip op. at 4 (Me. Oct. 15, 1993). Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

This case involves a challenge to the long-standing authority, and in this case, the obligation, of municipalities to provide for solid waste disposal pursuant to municipal police powers. For reasons stated in this Petition, the Flow Control Ordinance is valid under the Commerce Clause, either because the Commerce Clause is inapplicable to it or because if applicable, it withstands scrutiny under the appropriate test; these reasons support the granting of the writ of *certiorari*.

First, principles of federalism and the actions of Congress in the area of solid waste management policy demand that the Town (as well as state and local governments in general) have broad authority and discretion to provide for and finance solid waste management facilities. A fundamental inquiry here that is separate from the dormant Commerce Clause analysis applied below, but which concerns the scope of the Commerce Clause (an inquiry that has received little attention from reviewing courts), is the role of federalism in the context of local, regional and state long-term, integrated solid waste management programs. Congress has defined the federal/state relationship for Tenth Amendment purposes through federal legislation and has left to state and local governments the primary responsibility for comprehensive planning for solid waste management. State and local governments, which must prepare and implement solid waste management plans, may do so without the restraint of the dormant Commerce Clause.

Second, "flow control" laws and ordinances that have been enacted under a town's police powers to carry out these responsibilities recently have come under attack as violating the dormant Commerce Clause. Lower courts are deeply divided on the outcome of this issue. Petitioners assert that it is questionable whether the dormant Commerce Clause analysis is applicable at all to cases such as the instant case. To the extent that the dormant

Commerce Clause does apply, however, conflicts among the lower courts regarding this issue urgently require resolution. In light of this division among the courts, proceeding to trial on remand from the Law Court in this case presents a great difficulty to the Town and RWS, since it is unclear what they must show to meet their burden of proof; hence, this Court's resolution of the issue is necessary.

Third, this case presents a different factual situation from one recently heard by this Court—this case not only more readily lends itself to addressing the central issue of the constitutional validity of flow control ordinances and the ability of towns to enforce them, but also presents more compelling reasons for upholding a flow control ordinance in the face of a Commerce Clause challenge. This Court recently heard argument in *Town of Clarkstown v. C.A. Carbone, Inc.*, 587 N.Y.S.2d 681 (1992), *cert. granted*, 126 L.Ed.2d 369, 62 U.S.L.W. 3334, a case addressing the ability of a town to direct the processing of solid waste to a transfer station designated by the town. Here, the Flow Control Ordinance, by contrast, more squarely addresses a local government's ability to enforce a long-term, integrated solid waste disposal management plan for all residential and commercial solid waste generated within the Town.

In sum, granting a writ of *certiorari* in this case would allow the Court to clarify the Commerce Clause issue raised when a town exercises its statutory responsibility and police power authority to implement a plan of long-term solid waste management.

I. PRINCIPLES OF FEDERALISM DEMAND THAT THE TOWN OF GRAY'S FLOW CONTROL ORDINANCE BE EXEMPT FROM THE REACH OF THE COMMERCE CLAUSE.

The principles of federalism and democratic self-governance articulated by the Court in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985),

require that the Town be able to adopt and enforce its Flow Control Ordinance, free from constraints or prohibitions that might be imposed by the Commerce Clause.

In *Garcia,* the Court overruled *National League of Cities v. Usery,* 426 U.S. 823 (1976), which stood for the proposition that Congress is not authorized by the Commerce Clause to enforce certain provisions of the Fair Labor Standards Act ("FLSA") against state governments "in areas of traditional governmental functions." *Id.* at 852. Characterizing the "traditional governmental function" test as "not only unworkable but . . . also inconsistent with established principles of federalism . . .", the Court observed in *Garcia* that:

> The essence of our federal system is that within the realm of authority left open to them under the Tenth Amendment to the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be.

Garcia, 496 U.S. at 546. The Court then held that it is the federal political process which has the role of preserving the state's interests and defining when the states will be free from the reach of the Commerce Clause:

> But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal government action. The political process ensures that laws that unduly burden the states will not be promulgated.

Id. at 556. Therefore, because the Court perceived that nothing in the FLSA's overtime and minimum-wage provisions was "destructive of state sovereignty or violative of any constitutional provision," the Court held that the national political process had protected the state (and local) government from the burden of application, under the Commerce Clause, of the FLSA to the San Antonio

Metropolitan Transit Authority ("SAMTA") employees. *Id.* at 554-556.

Application of the federalism test of *Garcia* to the instant case compels the conclusion that the Flow Control Ordinance is beyond the scope of the limitations of the Commerce Clause and therefore of the implied limitations of the dormant Commerce Clause. Although there is federal legislation in the area of solid waste management, this legislation directly places responsibility for solid waste management on state and local governments. In the Resource Conservation and Recovery Act of 1976 ("RCRA"), Congress specifically found that "the collection and disposal of solid waste should continue to be primarily the function of state, regional and local agencies."[9] 42 U.S.C.A. § 6901(a)(4) (West 1983). Thus, the national political process—through Congress—has reserved to state and local governments the authority to determine the manner in which they will meet solid waste management obligations.

The principles of federalism and democratic self-governance enunciated by the Court in *Garcia* thus re-

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[9] This Congressional finding is consistent with the traditional role of local governments in solid waste collection and disposal. This Court has recognized since early in this century that solid waste disposal and collection is a proper municipal function generally "performed or franchised by the local municipality." O'Reilly, *State & Local Government Solid Waste Management* § 1:03 at 7. *See also* 7 McQuillin, *The Law of Municipal Corporations* § 24.242 at 116 and § 24.245 at 125 (3rd ed.); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905); *Hybud Equipment Corp. v. City of Akron, Ohio*, 654 F.2d 1187, 1193 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1981) (referring to *California Reduction Co.* and *Gardner*, the court observed that "[t]he old cases are not anachronisms."). Given this history, the Town's authority over solid waste collection and disposal and the adoption and enactment of the Flow Control Ordinance surely would constitute a "traditional governmental function" excluded from the scope of the Commerce Clause under the *National League of Cities* standard rejected by the Court in *Garcia*.

quire the Court to uphold the Flow Control Ordinance. The Flow Control Ordinance represents a valid exercise of police power by the Town pursuant to state flow control enabling legislation (38 M.R.S.A. § 1304-B) (West 1989 and Supp. 1993) to promote the health, safety and welfare of the Town's citizens. The Flow Control Ordinance also is consistent with the Town's home rule authority, pursuant to the Constitution of Maine and a Maine statute, to enact police power ordinances. *See* Me. Const., art. VIII, pt. 2, sec. 1, and 30-A M.R.S.A. § 3001 (West Supp. 1993); *School Committee of Town of York v. Town of York*, 626 A.2d 935, 938-39 (Me. 1993) (recognizing the Maine Legislature's intent in enacting 30-A M.R.S.A. § 3001 (West Supp. 1993) "to convey a plenary grant of the state's police power to municipalities, subject only to express or implied limitations.") Where the national political process has expressly reserved the responsibility to manage solid waste to state and local governments, the decisions of state and local voters regarding the appropriate manner of solid waste management and its financing must be held to be beyond the scope of the Commerce Clause.

II. THE COMMERCE CLAUSE IS INAPPLICABLE TO THE TOWN OF GRAY'S FLOW CONTROL ORDINANCE.

For several reasons, the Commerce Clause should not be applied to the Flow Control Ordinance. Congress has enacted legislation that explicitly or implicitly authorizes local flow control ordinances, the Flow Control Ordinance is not the type of activity against which the Commerce Clause is intended to protect and the Flow Control Ordinance does not impermissibly interfere with interstate commerce. Each of these reasons is stated more fully below.

The dormant Commerce Clause analysis applies only to restrict state and local legislation where Congress has not addressed a given subject. Congress has acted with

regard to flow control, however, by enacting RCRA, which implicitly authorizes local flow control ordinances. The pertinent provision of RCRA, 42 U.S.C.A. § 6943(a)(5) (West 1983), explicitly recognizes the ability of state and local governments to enter into long-term contracts for solid waste disposal. The authority to so contract would be meaningless without flow control authority. Flow control ordinances in furtherance of this contract authority must be held authorized under § 6943(a)(5) as well—otherwise, the statute would be deprived of its utility and meaning.

RCRA at least implicitly authorizes local governments to enact flow control ordinances that might otherwise impermissibly interfere with interstate commerce. Congress enacted RCRA in 1976 in recognition of the growing solid waste crisis in this country. Under RCRA, responsibility for managing and solving this crisis is placed squarely on the shoulders of state and local governments. 42 U.S.C.A. § 6901(a)(4) (West 1983). In the face of a Congressional mandate reserving this authority to state and local governments, state and local legislation enacted to further Congress' will does not run afoul of the Commerce Clause.

After 1976, states therefore began to enact a variety of comprehensive, integrated solid waste management plans to provide long term solutions to the solid waste crisis. At least 26 states now have passed statutes that both enable and obligate local governments to control the disposal of municipal solid waste.[10] No longer is "out-of-

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[10] Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. § 22A-220A); Delaware (Del. Code Ann. tit. 7, § 6406 (31)); Florida (Fla. Stat. Ann. § 403.713); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Ann. Stat. ch. 65, para. 5/11-19-1); Indiana (Ind. Code §§ 36-9-31-3 & -4); Iowa (Iowa Code § 28G.4); Louisiana (La. Rev. Stat. 30:2307(9)); Maine (Me. Rev. Stat. Ann. tit. 38, 1304-B(2)); Mississippi (Miss. Code Ann. § 17-17-319); Missouri (Mo. Rev. Stat. § 260.202); New Jersey (N.J. Stat. Ann.

sight, out-of-mind" a sufficient or acceptable method of dealing with solid waste. As community after community began to discover the hazards that result from improper landfills polluting groundwater, as space for landfills decreased dramatically and as regulations for licensing new ones concomitantly increased, states began to take seriously their obligation regarding solid waste disposal and undertook to develop long-term plans for this purpose.[11] Much of the legislation passed at the state level delegates both the authority and the responsibility for solid waste management to local governments. Some of the statutes also encourage and enable planning and disposal to occur on a regional basis.

Enabling a local government to direct the flow of municipal solid waste generated within that town serves multiple purposes, all of which relate back to that town's and ultimately that state's obligation for long-term, integrated solid waste management planning. Those purposes include advancing the health, safety and environmental welfare of the town's citizens by: (1) allowing the town to manage the entire municipal solid waste stream; (2)

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§§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws ch. 569, at 1687-89); North Carolina (N.C. Gen. Stat. § 130A-294); North Dakota (N.D. Cent. Code, § 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01(H)(2)); Oregon (Or. Rev. Stat. § 268.317(3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen. Laws § 23-19-10(40)); Tennessee (Tenn. Code Ann. 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, §§ 2003a, 2203b); Virginia (Va. Code Ann. § 15.1-28-01); Washington (Wash. Rev. Code § 36.58.040, 35.21.210); West Virginia (W. Va. Code § 16-26-16); Wisconsin (Wis. Stat. § 159.13(3), (11)).

[11] Congress recognized these hazards of solid waste landfills when it amended RCRA in 1984 to add the following finding with regard to the environment and health:

> Alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken. 42 U.S.C.A. § 6901 (b)(8) (West Supp. 1993).

allowing the town to guarantee sufficient waste to enter into long-term agreements for waste-to-energy facilities; (3) creating a solid waste management system that is more environmentally sensitive and advanced; (4) avoiding the potentially adverse environmental impacts associated with landfilling all municipal solid waste; and (5) achieving significant waste reduction by the waste-to-energy process.

The resulting flow control ordinances therefore are grounded in the authority that was reserved to the states by Congress through RCRA and primarily address the health, safety, and environmental welfare of each town's and state's citizens. To implement this delegation of authority, Maine enacted legislation in 1983 to authorize flow control ordinances and enacted legislation in 1987 to codify an integrated state solid waste management plan that relies primarily upon regional and municipal management of solid waste efforts. The Flow Control Ordinance here is the product of this federal law, state delegation and municipal home rule; as such, it is exempt from the reach of the Commerce Clause.

In addition, the activities governed by the Flow Control Ordinance do not fall into any of the categories disfavored under Commerce Clause jurisprudence.[12] The restrictions

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[12] The Town's Flow Control Ordinance does not implicate Commerce Clause concerns that are raised in a number of other cases including: 1) a state or political subdivision isolating itself from economic problems experienced elsewhere in the country, *e.g.*, *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); 2) quarantines imposed by states to protect an in-state industry from products in interestate commerce, *e.g.*, *Maine v. Taylor*, 477 U.S. 131 (1986); 3) preference for in-state economic interests over out-of-state competitors, *e.g.*, *Philadelphia v. New Jersey, supra*; *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. ——, 112 S.Ct. 2019 (1992); 4) hoarding a resource, *e.g.*, *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781 (4th Cir. 1991); 5) discrimination against competitors from other states with products in interstate commerce, *e.g.*, *Hunt v. Washington State Apple Comm'n*, 432 U.S. 333 (1977); 6) imposing burden-

of the Commerce Clause should therefore not be applied to the Flow Control Ordinance for this reason as well.

Finally, the Flow Control Ordinance seeks only to plan for and manage solid waste generated within the Town. Unlike the laws at issue in *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. ——, 112 S.Ct. 2019 (1992), and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Flow Control Ordinance neither excludes waste generated in other municipalities nor discriminates against other out-of-town or out-of-state interests. Rather, the Town has designated RWS as the facility to which solid waste generated in the Town must be delivered. RWS is part of an integrated solid waste management plan to dispose of solid waste, generate electricity through the incineration of the waste, and provide for recycling and other waste management activities.

III. IF THE COMMERCE CLAUSE DOES NOT APPLY TO THE TOWN'S FLOW CONTROL ORDINANCE, THE LESSER STANDARD OF SCRUTINY UNDER *PIKE v. BRUCH CHURCH* IS THE APPROPRIATE TEST.

As noted previously, the Law Court concluded that while the Flow Control Ordinance does not facially discriminate against out-of-state interests and so is not *per se* invalid, it nevertheless has a discriminatory effect on interstate commerce by prohibiting waste that would otherwise be available for interstate trade from crossing state lines. *Tri-State Rubbish, Inc. v. Town of Gray*, No. CUM-93-45, Decision No. 7754, slip op. at 6 (Me. Oct. 15, 1993). Pet. App. 6a. Therefore, the Law Court ap-

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some and conflicting regulations upon businesses involved in commerce in multiple states, *e.g., Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); and 7) burdensome registration and inspection requirements, *e.g., Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 977 (1993); *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993).

parently has determined that the appropriate test to be applied by the Superior Court on remand is the "strict scrutiny" test cited in *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 353 (1977). This test places upon the Town and RWS the burden to show valid reasons for the Flow Control Ordinance other than economic protectionism and the unavailability of reasonable alternatives.

The Law Court did not discuss how such discrimination manifests itself and indeed no such discrimination does exist. In fact, those subject to the Flow Control Ordinance pay a tipping fee at RWS that generally is higher than that charged by a nearby in-state incineration facility or by an out-of-state landfill; this is the result of the Town's decision to provide a solid waste disposal facility—the Facility—that is preferred by Maine to the landfilling of municipal solid waste (or the result of some waste-to-energy facilities obtaining more favorable contracts for sale of electricity). *See* 38 M.R.S.A. § 2101 (West Supp. 1993) (establishing the state hierarchy of solid waste disposal methods preferring incineration to land disposal of waste.) This Court has held, in the context of state highway safety regulations, that where those subject to a law challenged under the Commerce Clause bear an increased burden because of the law, their economic interest serves as a check against economic protectionism or discrimination against out-of-state interests. *Kassel v. Consolidated Freightways Corp. of Delaware,* 450 U.S. 662, 675 (1981). With regard to the instant issue of validity of a solid waste flow control ordinance under a Commerce Clause challenge, the Third Circuit has upheld a flow control ordinance adopted in connection with a New Jersey county's transfer station, explaining, "[I]t is precisely the evident fact that the [flow control] Rule places the burden on alleviating the garbage problem upon New Jersey residents that makes this case unlike *Philadelphia v. New Jersey.*" *J. Filiberto Sanitation, Inc. v. Dept. of Envtl. Protection,* 857 F.2d 913,

921-922 (3rd Cir. 1988). The Flow Control Ordinance does not discriminate, but rather regulates even-handedly with regard to all solid waste generated within the Town; therefore if the Commerce Clause applies to this case, it should be analyzed under the lesser standard of scrutiny delineated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).[13]

Under the *Pike* balancing test, it is evident that any burden on interstate commerce created by the Flow Control Ordinance is incidental. In addition, any burden that is found to exist is far outweighed by the multiple benefits conferred by the Flow Control Ordinance referred to above. Moreover, the Flow Control Ordinance is not an example of economic protectionism, both because the economic aspect of designating a facility for receipt of all municipal solid waste is only one small factor within a larger comprehensive solid waste management plan and because RWS was created as an outgrowth of statutory mandates to manage the solid waste crisis, not as an indigenous industry that would require economic protection.

Insuring the long-term economic viability of RWS is only one factor that is considered by the Flow Control Ordinance. This one factor is only a component part in

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[13] Even if the Flow Control Ordinance is deemed to "discriminate" against interstate commerce as opposed to presenting an incidental burden upon it, this Court has stated that not all discrimination is impermissible and that states may regulate matters of "legitimate local concern." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (*citing Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980). In addition, this Court has also "long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other." *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) ("a State's power to regulate commerce is never greater than in matters traditionally of local concern."); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980) (states "retain authority under their general police powers to regulate matters of 'legitimate local concern', even though interstate commerce may be affected").

the integrated solid waste management plan. The other health, safety and environmental welfare factors make it clear that the purposes behind both the state legislation and the Flow Control Ordinances are far broader than assuring the economic viability of a single facility that is owned by the Member Municipalities.

The Law Court therefore either should have upheld the grant of summary judgment by the Superior Court outright, or should have applied the lesser standard of scrutiny outlined in *Pike v. Bruce Church, Inc.* and upheld the Flow Control Ordinance.

IV. LOWER COURTS ARE DEEPLY DIVIDED ON WHETHER THE COMMERCE CLAUSE ALLOWS MUNICIPALITIES TO TAKE RESPONSIBILITY UNDER THEIR POLICE POWERS FOR LONG-TERM PLANNING OF SOLID WASTE MANAGEMENT.

Courts representing all geographic regions of the country have ruled on this issue with strikingly different results. Several state and federal courts have upheld solid waste flow control ordinances. The Sixth Circuit has done so in a case that provides the touchstone analysis for those cases ruling favorably on this issue. *See Hybud Equip. Corp. v. City of Akron,* 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds,* 455 U.S. 931 (1982), *on remand,* 742 F.2d 949 (6th Cir. 1984), *cert. denied,* 471 U.S. 104 (1985). In addition, the Third Circuit affirmed the use of police power to direct the flow of solid waste in *J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Envtl. Protection,* 857 F.2d 913 (3rd Cir. 1988). The *Town of Clarkstown* decision, 587 N.Y.S.2d 681 (1992), *cert. granted,* 126 L.Ed.2d 369, 62 U.S.L.W. 3334, upheld the ability of a town to plan for long-term solid waste disposal. Similarly, the courts in *In re Fiorillo Bros.,* 577 A.2d 1316, *cert. denied,* 585 A.2d 371 (1990), and *Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.,* 600 F.Supp. 1369 (D. Del. 1985), also upheld a

local government's ability to plan and control solid waste disposal.

There also are several courts which have invalidated local flow control ordinances. *See Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F.Supp. 1566 (M.D. Ala. 1993), and *Container Corp. of Carolina v. Mecklenburg County*, No. 92 Cv-154-MV (W.D.N.C. June 14, 1992) (granting preliminary injunction); *DeVito v. Rhode Island Solid Waste Management Corp.*, 770 F.Supp. 775 (D.R.I. 1991), *aff'd*, 947 F.2d 1004 (1st Cir. 1991); *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1991). However, Petitioners assert that these were wrongly decided because in some of these cases, a strict scrutiny standard was erroneously applied, and because in others, the facts of these cases are distinguishable from those of the instant case.

The central issue in an analysis of the validity of the Flow Control Ordinance should be whether a local government's police power authority includes the authority to regulate disposal of solid waste generated within its borders for the purpose of municipal solid waste management. The Flow Control Ordinance provides this Court with an ideal opportunity to decide this issue. The Flow Control Ordinance was enacted precisely because of federal law and state mandates and enabling legislation obligating the Town to act precisely as it did: to develop an ordinance that would be a component part of a comprehensive, long-term, solid waste management plan. The Flow Control Ordinance and its user-based financing system is a valid police power enactment because it permits the Town to implement an environmentally sensitive and advanced method of long-term solid waste management. Therefore, the Commerce Clause issue should be resolved, and it should be resolved in favor of local governmental authority over solid waste management.

V. THE TOWN OF GRAY'S FLOW CONTROL ORDINANCE PRESENTS A MORE COMPELLING CASE TO UPHOLD SUCH AN ORDINANCE THAN DOES THAT OF CLARKSTOWN.

The Flow Control Ordinance presents a more compelling factual scenario than that described in the decision in *Town of Clarkstown,* 587 N.Y.S.2d 681 (1992), *cert. granted,* 126 L.Ed.2d 369, 62 U.S.L.W. 3334, on this issue. First, the Flow Control Ordinance facilitates the operation of a major, region-wide solid waste management facility—not only a transfer station. Second, the Facility was constructed and the Flow Control Ordinance enacted pursuant to a state mandate *requiring* the provision of a disposal facility. *See* 38 M.R.S.A. § 1305(1) (West 1989). Third, the Flow Control Ordinance at all times has been authorized by state statutes enabling flow control ordinances and requiring towns to make reasonable efforts to meet state recycling goals. *See* 38 M.R.S.A. §§ 1304-B, 2132 and 2204 (West 1989 and Supp. 1993). In addition, here, there was an extensive feasibility study of solid waste management alternatives undertaken prior to the construction of the Facility.[14] Finally, financing of the Facility was predicated on the requirement that flow control laws be enacted by each Member Municipality.

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[14] *See* note 5, *supra.*

CONCLUSION

For the reasons stated above, this Petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

Reporter of Decisions
Decision No. 6654
Law Docket No. Cum-93-45

MAINE SUPREME JUDICIAL COURT

TRI-STATE RUBBISH, INC.

v.

TOWN OF GRAY

and

REGIONAL WASTE SYSTEMS, INC.

Argued September 9, 1993
Decided October 15, 1993

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, COLLINS, RUDMAN and DANA, JJ.

RUDMAN, J.

Tri-State Rubbish, Inc. ("Tri-State"), and Recyclables Unlimited Services, Inc. ("RUSI"), appeal from the adverse summary judgments entered in the Superior Court (Cumberland County, *Lipez, J.*) on their claims for declaratory judgment and injunctive relief. The trial court rejected contentions by Tri-State and RUSI that the Town of Gray's Solid Waste, Flow Control and Recycling Ordi-

nance violates the Commerce Clause of the U.S. Constitution [1], denies Tri-State and RUSI equal protection of the laws, and violates state and federal antitrust laws. Although the equal protection and antitrust challenges are without merit, genuine issues of material fact remain whether the Ordinance violates the Commerce Clause. We therefore vacate the judgments of the Superior Court.

Effective April 3, 1992, the Town of Gray ("Gray") adopted a Solid Waste, Flow Control and Recycling Ordinance ("Ordinance") which requires that all solid waste generated in the Town of Gray be disposed of at the Portland facility of Regional Waste Systems, Inc. ("RWS"). The avowed purpose of the Ordinance was to regulate solid waste collection and disposal, encourage recycling, and provide property owners with disposal facilities at a reasonable cost. The Ordinance was authorized by state law, 38 M.R.S.A. § 1304-B(2) (1989 & Supp. 1993)[2], and complied with the Waste Handling Agreement between Gray and RWS.

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[1] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const. Art. I, § 8, cl. 3.

[2] Flow Control. Subject to the provisions of Chapter 24 [MAINE WASTE MANAGEMENT AGENCY 38 M.R.S.A. § 2101 (Supp. 1993)] municipalities are expressly authorized to enact ordinances that control solid waste collection, its transportation or its delivery to a specific facility, when the purpose and effect of such an ordinance is to gain management control over said waste and enable the reclamation of resources, including energy, from these wastes. This authorization includes, but is not limited to, ordinances:

A. Requiring segregation of wastes;

B. Requiring delivery of wastes generated within the municipality, or any portion of those wastes, to a designated disposal or reclamation facility;

C. Designating certain materials as recyclable and exempt from the provisions of paragraph B; and

D. Designating yard wastes as compost material and requiring delivery of these wastes to a designated composting facility.

RWS operates a waste-to-energy plant located in Portland. Twenty-one member municipalities, including Gray, pledged their full faith and credit to repay the bonds that financed construction of the plant should RWS default on its obligation to repay. In an effort to insure that RWS remain financially viable, all member municipalities passed ordinances similar to Gray's, guaranteeing that all "acceptable waste" [3] generated within each municipality would be funneled to RWS for incineration.

Tri-State, a Maine corporaiton, has engaged in the business of commercial and residential trash collection in the Town of Gray for almost twenty years. In the past, Tri-State has generally disposed of the waste it collects at either the facilities of Maine Energy Resources Corporation ("MERC") in Biddeford, or Mid-Maine Waste Action Corporation ("MMWAC") in Auburn. MERC and MMWAC would incinerate the waste to generate energy, that would then be sold in interstate commerce. RUSI, a Maine corporation, recycles glass, paper, and corrugated board and sells the materials in interstate commerce.

Disposal facilities generally charge a "tipping fee" for accepting waste. The Gray Ordinance, however, allows a private waste generator to deposit its trash at the Gray transfer station without payment of a tipping fee. Commercial waste haulers, on the other hand, must transport their waste to RWS for incineration. If a waste generator segregates its waste in to recyclable/non-recyclable components, and then hires a commercial hauler to remove the waste, the hauler must take the recyclable components to the Gray transfer station and the non-recyclable components to RWS.

Tri-State objects to the Ordinance because of the increased tipping fees that the law imposes on commercial

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[3] According to the Ordinance, acceptable waste includes "[o]rdinary household, municipal, institutional, commercial and industrial solid waste," and excludes hazardous waste.

haulers.[4] RUSI objects to the Ordinance because it cuts off the flow of recyclable waste that RUSI processes in its business.

Tri-State and RUSI contend that the Ordinance violates their right to equal protection of the laws, because it discriminates against commercial enterprises. This contention is meritless. *City of Auburn v. Tri-State Rubbish, Inc.*, No. 6625, slip op. at 10 (Me. Aug. 5, 1993). Similarly, Tri-State and RUSI's claim that the arrangement violates antitrust laws is unsupportable. We recently ruled that state action immunity to federal antitrust laws applies to this type of arrangement. *Id.* at 8. *See also Tri-State Rubbish, Inc. v. Waste Management Inc.*, 803 F. Supp. 451 (D. Me. 1992), *aff'd in pertinent part*, No. 92-2218 (1st Cir. July 19, 1993). The flow control ordinance enabling act, 38 M.R.S.A. §1304-B(2), authorizes Gray's arrangement with RWS and therefore precludes any violation of state antitrust laws. *See Beaulieu v. City of Lewiston*, 440 A.2d 334, 345 (Me. 1992) (specific legislation controls general).

The Commerce Clause violation asserted by Tri-State and RUSI, however, presents genuine issues of material fact. Although the waste at issue is generated in-state and largely disposed of in-state, it is an object of interstate commerce. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2023 (1992). The aggregate effect of ordinances similar to Gray's could have a substantial impact on interstate commerce. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 537 (1985); *Hodel v. Virginia Surface Mining and Reclamation Ass'n. Inc.*, 452 U.S. 264, 277 (1981).

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[4] RWS charged (as of July 1, 1992) forty-three dollars per ton for municipal solid waste and sixty-one dollars per ton for commercial solid waste. The tipping fees at MERC for the same time period ranged from twenty-six to thirty-five dollars per ton.

In the *City of Auburn* case, the question whether a plaintiff that did not seek to place trash in the interstate market could challenge a similar ordinance on Commerce Clause grounds was not squarely presented. *Id.* at 11 n.13. The present case, however, presents the issue, which we now answer affirmatively. Even if it is true that Tri-State does not engage in interstate commerce itself, it has standing to challenge the Ordinance on Commerce Clause grounds. The Ordinance inflicts an injury in fact on Tri-State, and as a hauler of solid waste, Tri-State falls within the "zone of interests" protected by the Commerce Clause. *Diamond Waste, Inc. v. Monroe County*, 796 F. Supp. 1511, 1516 (M.D. Ga. 1992). *See also Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977); *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 753 F. Supp. 739, 761 (S.D. Ind. 1990), *aff'd*, 975 F.2d 1267, 1274-75 (7th Cir. 1992).

The "Dormant Commerce Clause" [5] prohibits states and their political subdivisions from "advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Fort Gratiot*, 112 S. Ct. at 2023. A neutral regulation that imposes only an incidental burden on interstate commerce is valid as long as that burden is not "clearly excessive in relation to the putative local benefits" the regulation is designed to serve. *Stephen D. DeVito, Jr. Trucking v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775, 780 (D.R.I.) (citing *Maine v. Taylor*, 477 U.S. 131, 138 (1986), *aff'd per curiam*, 947 F.2d 1004 (1st Cir. 1991)). On the other hand, if the interference is nothing more than "economic protectionism," benefit-

[5] "The dormant Commerce Clause, as the term 'dormant' implies, limits the powers of the States in areas where Congress has not affirmatively acted to either authorize or forbid the challenged state activity." *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 392 (3d Cir. 1987). *See New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (referring to the "negative aspect" of the Commerce Clause).

ting in-state economic interests at the expense of out-of-state competitors, the regulation is deemed unconstitutional *per se*. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Gray's Ordinance does not facially discriminate against out-of-state interests, and so it escapes *per se* invalidity. Rather, Gray's Ordinance appears to pursue legitimate local goals, by gaining control of the waste stream and promoting recycling and energy recovery. The Ordinance, however, has a discriminatory effect on interstate commerce by prohibiting waste that would otherwise be available for interstate trade from crossing the state line. *Waste Systems Corp. v. County of Martin*, 784 F. Supp. 641, 645 (D. Minn. 1992). Gray and RWF must therefore show valid reasons for this Ordinance other than economic protectionism and must also show that reasonable alternatives to the Ordinance are unavailable. *City of Auburn*, No. 6625, slip op. at 13 (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353) (1977)).

The entry is:

> Judgment vacated. Remanded to the Superior Court for further proceedings consistent with the opinion herein.

APPENDIX B

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court

Law Court Docket No. CUM-93-45

TRI-STATE RUBBISH, INC.

v.

TOWN OF GRAY and REGIONAL WASTE SYSTEMS, INC.

MANDATE

The above-captioned cause having been brought before this Court, sitting as the Law Court, from the Superior Court in the County of Cumberland, and it having been heard and maturely considered:

IT IS ORDERED that the Clerk of the Law Court enter upon the Law Court Docket and certify to the Clerk of the Superior Court in the County of Cumberland, the following mandate therein:

> Judgment vacated. Remanded to the Superior Court for further proceedings consistent with the opinion herein.

Dated: October 15, 1993

For the Court,

/s/ Paul L. Rudman
Justice

APPENDIX C

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT

Civil Action Docket No. CV-92-719

TRI-STATE RUBBISH, INC. and
RECYCLABLES UNLIMITED SERVICES, INC.,
Plaintiffs

v.

TOWN OF GRAY,
Defendant

and

REGIONAL WASTE SYSTEMS, INC.,
Intervenor

ORDER

After hearing upon Regional Waste Systems, Inc.'s Motion to Intervene, Plaintiffs' Motion for Preliminary and Permanent Injunction, Defendant and Intervenor's Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment and for reasons stated on the record during the hearing on these Motions, this Court hereby Orders as follows:

1. The Motion to Intervene of Regional Waste Systems, Inc. ("RWS") is granted.

2. The Plaintiffs' Motion for Preliminary and Permanent Injunction is denied.

3. Defendant and Intervenor's Motion for Summary Judgment is granted.

4. Plaintiffs Tri-State Rubbish, Inc. and Recyclables Unlimited Services, Inc., their officers, directors, agents employees, servants, and any other person or corporation acting for or on behalf of Plaintiffs:

a. be and hereby are enjoined, effective February 1, 1993, from violating the Solid Waste, Flow Control and Recycling Ordinance of the Town of Gray, Maine (the "Ordinance"), and unless by February 1, 1993 Tri-State Rubbish, Inc. submits a completed application to the Town Clerk of the Town of Gray ("Town") for a commercial hauler's license under the Ordinance and diligently pursue that application before the Town Council, they shall not haul, transport, collect, remove or dispose of Acceptable Waste generated within the Town for a fee, nor shall they solicit new clients from within the Town for the same services;

b. shall comply, effective February 1, 1993, with the Ordinance and in particular, shall deposit all Acceptable Waste generated within the Town and collected by them at the RWS facility only in accordance with the Ordinance; and

c. shall, effective February 1, 1993, deposit at the Town's Recycling Facility located at the Town's Transfer Station any and all recyclable materials that they or their customers choose to segregate from the Acceptable Waste generated within the Town that Plaintiffs haul, transport, collect, remove or dispose of, with said depositing of recyclable materials at the Town's Recycling Facility to be in accordance with the Town's rules and regulations therefor.

5. Post-judgment attorneys' fees and costs incurred in the enforcement of Paragraph 4 of this Order shall be awarded at the discretion of the Court based upon written affidavits.

6. Plaintiffs' Objection to the Defendant and Intervenor's Motion for Summary Judgment is, as Plaintiffs stated, a Cross-Motion for Summary Judgment on the merits; Plaintiffs' Cross-Motion for Summary Judgment is denied.

7. This Order is an appealable final judgment on all claims and counterclaims raised by the parties in this action.

By:/s/ Kermit V. Lipez
KERMIT V. LIPEZ
Justice, Superior Court

Dated: January 26, 1993

APPENDIX D

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT CIVIL ACTION

Docket Number: CV-92-719

TRI-STATE RUBBISH, INC.

versus

TOWN OF GRAY

BEFORE:

The Honorable Kermit V. Lipez, Justice of the Superior Court, at the Cumberland County Superior Court, Portland, Maine, on January 12, 1993.

APPEARANCES:

Ralph A. Dyer, Esq.
Attorney for the Plaintiff

James N. Katsiaficas, Esq.
Emily A. Bloch, Esq.
Attorneys for the Defendant

[2] (This matter came for hearing before The Honorable Kermit V. Lipez, Justice of the Superior Court, at the Cumberland County Superior Court, Portland, Maine, on Tuesday, January 12, 1993.)

COURT: This next matter is Cumberland County docket number 92-719. It's the case of Tri-State Rubbish, Inc., et al versus The Town of Gray, et al. Before we get into the substance of all this, let me again just ask

counsel to identify themselves for the record, and state the party that they represent. We'll start with Mr. Dyer.

RALPH A. DYER, ESQ: For the plaintiff, your Honor, Ralph Dyer.

JAMES N. KATSIAFICAS, ESQ.: For defendant Town of Gray and for Intervenor Regional Waste Systems, Incorporated, James Katsiaficas and Emily Bloch, your Honor.

COURT: The first matter we should discuss is the motion of Regional Waste Systems to intervene. I gather that issue remains unresolved. And Mr. Dyer has indicated that he has no objection to the intervention of Regional Waste Systems. He acknowledges their interest in this proceeding, but is troubled by a conflict that he foresees or sees now if both The Town of Gray and Regional Waste Systems are represented by the law firm. I'm not sure, Mr. Dyer, I understand how that problem affects the ability of your client to put forth his position in this forum. You seem to suggest that in some [3] way, that conflict, as you see it, impacts in some way on your clients. I'm not sure I understand that.

MR. DYER: Well, it's our position, your Honor, that what Mr. Hart proposes to do, in terms of recycling of waste and how he proposes to handle it, are really consistent with what the objectives of the population of The Town of Gray want. He is retrieving waste, or intends to retrieve valuable parts of the waste stream and reuse them or make available for others to reuse. This runs in direct conflict with what RWS wants to do. RWS is motivated to burn that garbage and to promote a legal argument to satisfy that end. And my position is that when I come forward here and say to you that we're really doing something that benefits The Town of Gray and is consistent with the basic underlying purpose of the ordinance, that I'm met with two people who are standing up, saying, "No, that's not true." And I think that my client is prejudiced by having that happen.

COURT: Mr. Katsiaficas?

MR. KATSIAFICAS: Your Honor, RWS is a creature of the communities that formed it. Gray is one of them. Each municipality that belongs to RWS is under an obligation to dispose of all the solid waste generated within its borders, generated by commercial and residential entities. That obligation is why RWS exists. RWS has to dispose of it in accordance with the state law. The state law requires each [4] municipality to reduce the amount of solid waste it generates. Gray is doing that; RWS is assisting in those efforts. RWS has the silver bullet recycling containers that you see in all the municipalities in the immediate area. It has—it under—RWS understands it has the same obligation as its constituent municipalities, to take care of solid waste while also promoting recycling of waste that is capable of being recycled. There's no difference, here. There's no divergence of interest. RWS and Gray have identical interests, and therefore, it's reasonable that the same law firm can represent both. The conflict of interest is something that the client should raise with its own attorney. That hasn't been raised here. Both clients are aware of the dual representation and consent to it, because their interests are identical.

COURT: Yeah. I—Mr. Dyer, do you—

MR. DYER: I just want to point out, just to remind the Court that in our brief we cited §—38, MRSA, § 1304(A)—(4)(A)(a), which says that all contracts which mandate the delivery of recyclable waste is part of the waste stream to RWS are now abrogated. That obligation no longer is enforceable. RWS' contract with Gray provides that it shall deliver all solid waste, or actually, all acceptable waste to RWS, except those portions of the waste which were being recycled, both in terms of quantity and type, at the time that contract was signed. And RWS' claim is that they have a right to all other material, [5] and they make the decision whether to recycle or not. 1304(B)(4)(A)(a) says that provision is no longer enforceable and the municipality should have

the right to decide its own recycling programs. And that is the heart of the conflict here, your Honor.

COURT: Well, I—my conclusion, Mr. Dyer, is that that is an issue for The Town of Gray and for RWS to worry about. It seems to be your feeling that if different counsel were involved, perhaps on the part of The Town of Gray, that might be more sympathetic to your position, rather than joining RWS in antagonism to it. But I don't see, in that possibility, to the extent it might have a basis in fact in any way precludes this law firm from representing these two clients who certainly, I believe, understand the issues and the stakes as well as you do. I see no reason why they cannot choose to proceed, both of them, with counsel of their choice. So, for that reason, I do grant the Motion to Intervene. And both entities can proceed, since that appears to be their choice, with present counsel. Let's—

MR. DYER: Your Honor, let me just clarify one—

COURT: —sure.

MR. DYER: It's not that I'm looking for Gray to be sympathetic to our position. It—my concern is it's the double whammy [sic] in expressing a point of view to the Court or ultimately, at best, if appropriate, to a jury. [6] COURT: Sure. I understand. Okay. All right. Let's move on, now, to the merits. And there is so much here that it's, frankly, hard to know where to begin. But let's begin in this fashion. Mr. Dyer, I'd like to begin with you. Did you want to say something initially? I did have some questions, but—

MR. DYER: Perhaps we can streamline this a little bit, your Honor.

COURT: —sure.

MR. DYER: This—the motions before us today started with a Motion for a Preliminary Injunction. And let me say this to the Court about your Motion for a Preliminary Injunction. There are two reasons why it was filed, one reason being that we think we're entitled to the relief, anyway, or we wouldn't have brought the motion in

the first place. The second motion is that there is some dicta in some Maine cases which indicate that in these types of situations where there are continuing—there's continuing exposure to fines being assessed on a daily basis, that one should bring a preliminary injunction motion at the outset of the case, in order to curtail the running of the fines and to establish that as a precedent. That is a prudent thing to do in this kind of a case, and that's what—that is one of the moving reasons why we brought the Motion for a Preliminary Injunction. Now, this motion was met by the Motion for Summary Judgment.

[7] COURT: Right.

MR. DYER: And, in fact, although we haven't phrased it as a Cross-Motion for Summary Judgment, it is believed by us that the essential issues in this case are legal issues and not factual issues. And perhaps if we started by addressing the Motion for Summary Judgment, a lot of these other issues would fall into line.

COURT: Sure. I agree with that. I think that makes good sense. The—in that regard, Mr. Dyer, I would like to understand exactly why you feel that this ordinance—and I've—I think I understand how the ordinance works and how it alters the prior practices. I would like to understand why you feel that this ordinance denies your clients the equal protection of the laws, given what I believe is the standard that I have to apply, here, and that is whether the distinction that has been drawn, here, bears a rational relationship to a legitimate exercise of the Town's power in this area, the Town's authority. What—could you state for me, as clearly and concisely as you can, what is the nature of the unlawful discrimination, if you will, unlawful distinctions that you see here?

MR. DYER: Well, there are—setting aside the definition of solid waste for just a moment, and just focusing on the ordinance, I think I might have anticipated your question to some extent. And last night, I sat down and said, "What is the procedure of this particular ordinance

that has an adverse [8] impact upon my client?" And what I did is I said that let's start with §(7)(G) of the ordinance, which says that, "All agreements for trash and waste removal shall be by private contract, and the Town shall have no responsibility for those contracts." Now, that's important because that's what Mr. Hart's company, Tri-State Rubbish, does, that enter into private contracts with residential customers and with commercial customers. So that sets the stage in entering the ordinance, if you will. We then go to §(6)(E), which says—and also, a parallel provision, (7)(D), which says that, "Non-segregated waste shall be taken by the hauler to RWS." And that's all acceptable waste, as defined by §(7)(D). And what that says is that if Mr. Hart and his company, Tri-State Rubbish, pick up residential waste or commercial waste, if it's non-segregated, that is, co-mingled food waste, paper, what have you, that has to go to RWS at his expense. And he has to pay $58 a ton to drop that material. To digress just for one or two sentences, here, there is a two-rate structure at RWS, $58 per ton for commercial waste, and a lesser amount, which I think is $41 a ton, for residential waste. When Mr. Hart and Tri-State bring that waste to RWS, they pay the $58, regardless of where it comes from, on the basis that it is impossible for RWS or the community to determine which is which, so they just charge the higher rate across the board. Then that leaves us with a question, what do we do with the segregated waste, the [9] recycled material? There is no provision in the ordinance which deals with the question of segregated waste hauled by private contract. §(4)(A) says that, "Only residents can use the transfer station." And in that—by that definition, the Town excludes commercial haulers or private contractors from that definition, and haulers are not permitted to enter the transfer station to unload anything. §(7)(H) says that, "Any private contract shall require that all recyclables shall be brought to the Town in marketable condition." It doesn't indicate who is to bring that

material to the Town. But we do know that the disposal point is the transfer station, and we do know that the hauler is not permitted to enter the transfer station, which leads us to the inevitable conclusion that it is only the generator of the waste who can bring it in. And that is consistent with provision (4)(B), which says that, "All resegregated, recyclable material shall be brought to the transfer station only by the generator." And that leads us to a couple of questions. The impact of that system is that Tri-State cannot engage in a contract to pick up recyclable materials for its customers. Its customers, if they are to recycle, have to bring their own waste to the dump, or their own recoverable, recyclable waste to the Town transfer station. And Mr. Hart cannot do that. Mr. Hart is absolutely barred and prohibited from entering into that business by the terms of this ordinance. Secondly, it is our position that if a person is [10] to use a private contractor to haul his waste, he must bear, indirectly, the cost of the tipping [sic] fee. And the letter—the May 11th, 1992 letter from the Town, which we've attached, which sets forth their reasons for their statute clearly indicates, by reference and by direct statement, that the purpose is to force people to recycle and to bring their material to the transfer station. And if a person doesn't do that, then they're going to have to bear their cost of tipping. Now, we don't understand why Mr. Hart's customers, or Mr. Hart himself, acting for those customers, should be barred from the transfer station, simply because they have signed a private contract. It is the same people in the community who are generating waste, whether residential or commercial. Those people can have access to the facilities, but they are indirectly barred from using those facilities if they employ Mr. Hart. The result of that is that Mr. Hart's business has been decimated because he has had to raise his fees to cover the cost of tipping. Mr. Hart's testimony in his affidavit—and if the Court desires, he can testify. I have him here today—to testify that when this ordinance

passed, he had approximately three hundred residential customers in Gray. He's now down to a hundred and fifty customers in Gray, and he's losing $8,500 a year, after having raised the fees. And it is a declining spiral, that what Gray is doing is saying that, "We don't want private contractors in this town. We don't want [11] you doing business in this town. We want to control all the waste." And that is the discrimination that is happening with Mr. Hart, and it's discrimination under the due process clause, it's discrimination—it's a taking of his business, it's discrimination under the—it's a violation of the commerce clause, and if we go on—ultimately, when we get into the definition of solid waste, it violates the antitrust laws, because it's inconsistent with State policy, as well as what I believe to be the real true municipal policy, here.

COURT: Mr. Dyer, the—that's a very good and very clear explanation of what's—of what the issue is, here, as you see it. The—it's clear that, at least in part—well, let me do this. Rather than have me state it, I'd like, at this point, to ask Mr. Katsiaficas, number one, if he agrees with your analysis of what the ordinance does, and if not, I'd like to know why. But then, to the extent that's accurate, I'd like to know what purposes, from the Town's perspective, that scheme that Mr. Dyer has just described, serves? Mr. Katsiaficas?

MR. KATSIAFICAS: Thank you, your Honor. As the Court has noted, this is a very difficult burden for the plaintiff to overcome, in that the equal protection clause challenge must overcome an argument of presumptive validity on the part of the municipal ordinance, number one, and number two, with regard to these, you have to simply show that—you have to show that there's no rational relationship under any circumstances, any [12] set of circumstances between this ordinance and legitimate State ends. We believe that the legitimate legislative ends of the Town Council, in adopting this ordinance, are to ease the administrative and enforcement burden on the Town. And that's not a mere summary. It's

simply—if Tri-State and the other four private haulers that do business in the town were to take their solid waste that they collect from businesses and from residences to the transfer station, the Town will have to police it, to police the transfer station to make sure that only Gray waste is being accepted, and to make sure that there isn't unacceptable waste being brought in.

COURT: Now, it would have to police that because of its contractual relationship with RWS and the obligations that the Town has to RWS in light of that contractual relationship, is that correct?

MR. KATSIAFICAS: In that regard, and also because The Town of Gray, as it had been doing, was underwriting the tipping fee for everything placed at the transfer station. It wouldn't want to be underwriting tipping fees for trash collected in New Gloucester, for example, and brought into town by Tri-State. We're not alleging that they've actually done this, but simply there's a potential for doing that. And we ask the Court to take note that there have been allegations of problems of waste diversion. It's not unthinkable. It's something that the Town would have to police, [13] would have to administer. There's a cost to that. We're trying to minimize that cost and the Town's tipping fees.

COURT: Right. But until this new ordinance was passed, how was the Town—and under that prior relationship, Mr. Hart, his business—I mean, they could pick up waste directly from a residence or commercial establishment and take it directly to RWS, is that correct?

MR. KATSIAFICAS: To—they would take it, as I understand it, to the Town's transfer station.

COURT: Okay.

MR. KATSIAFICAS: And the Town would then charge $10 per ton. And then the Town would pay for transportation of all of the waste collected—

COURT: Okay. So they—

MR. KATSIAFICAS: —whether you, yourself, brought it or whether Tri-State brought it.

COURT: —okay. So, under the prior relationship, Mr. Hart could not take it directly to RWS, is that correct?

MR. KATSIAFICAS: As I understand it, he did not. He was to take it to the transfer station and then the Town would take it to RWS and pay the transportation costs, as well as the $40 per ton tipping fee. Since the Town was paying 40 and only charging 10, in effect, Tri-State's costs were being subsidized by the Town.

COURT: Well, obviously, in that rel—in that situation, [14] they could charge their own customers a lot less, because they only had to pay the $10 to the Town, is that correct? That was—

MR. KATSIAFICAS: That's correct.

COURT: —right.

MR. KATSIAFICAS: What this ordinance now does is say to any hauler collecting residential and commercial waste within the Town, "You have to bring that waste directly to RWS and pay RWS the tipping fee." That tipping fee for municipal waste is $43, for private—for commercial waste, $61. So there's a differential there. They're responsible—that becomes a cost of doing business. It's not just a cost of doing business, however, for Tri-State. It's a cost of doing business for the four haulers that are licensed to do business, and actually do business in the town. And those haulers are identified in Town Manager's Aubert's [sic] affidavit. So there are other entities doing business in the town. It's not—I don't—whether it's decimated Tri-State's business, I don't know. But there are other haulers that are licensed and are doing business.

COURT: Okay. But, now in this situation, if Mr. Hart can now take waste generated in The Town of Gray directly to RWS, how does the Town keep track of what is going directly from The Town of Gray to RWS? I mean, the Town does have an obligation, does it not, to still make sure that all its [15] acceptable waste, excluding some recyclable material that can be taken out, it still

has an obligation to make sure it all goes to RWS, isn't that correct?

MR. KATSIAFICAS: Well, that's one reason for these counterclaims, because, in fact, we understand from the pleadings here it's not going to RWS. Acceptable waste and the recyclable portions of the acceptable waste, according to the affidavits, are all going to West Paris, being separated—

COURT: Right. But—so how do you—but how would—

MR. KATSIAFICAS: —I underst—

COURT: —but how do you make sure? How do—you talk about the burden of policing. How do you police—if you have the commercial haulers dealing—taking waste directly from a generator to RWS without any intervention by the Town at its transfer station, how do you make sure that waste generated in The Town of Gray is getting to RWS?

MR. KATSIAFICAS: —well, we avoid—we don't know. I mean, we have to take it on faith that—

COURT: I mean, they have to do that, under their—I mean, they're now licensed, is that correct?

MR. KATSIAFICAS: —well, they haven't—they have not—

COURT: But they're supposed to be?

MR. KATSIAFICAS: —but they're supposed to be. And if they were, that would be their obligation—

COURT: Okay.

[16] MR. KATSIAFICAS: —and on penalty for not doing that, they could have their license revoked.

COURT: Right.

MR. KATSIAFICAS: We would have to police it in that sense.

COURT: Sure.

MR. KATSIAFICAS: But we don't believe that the obligation is as onerous as posting an extra person at the transfer station or doing the manifest system, as we find with State and Federal hazardous waste laws.

COURT: Okay.

MR. KATSIAFICAS: Another reason, though, we're trying to simply cut the costs of solid waste disposal for the towns. As we know, the State law posits all the responsibility on the municipality. The municipality has normally pledged its full faith and credit, but it also has to pay—it is paying for all of the tipping fees for waste brought to it. In other words, if you have a residence or a commercial entity in The Town of Gray, and you're willing to bring your own waste over to the transfer station, the Town will pay the tipipng fee, as long as you segregate the waste into recyclable and non-recyclable quantities. That is to promote recycling. The Town has an obligation under State law to promote recycling to reach State goals, and there's a penalty for failure to make reasonable efforts to do so.

COURT: Okay. Okay. Now, why—Mr. Dyer says that, under [17] the Town's scheme, only the generator of the waste can segregate in the way that you describe, and then bring the waste to the transfer station. Mr. Hart could not perform that function. Is Mr. Dyer correct in that regard?

MR. KATSIAFICAS: I don't read the ordinance that way. I think we're dealing with something speculative, in that, number one, I don't believe Mr. Hart has ever tried to bring recyclables to the transfer station, and, two, I believe that his intent is to be able to sell those to other entities. So I don't think that question is—in—at issue is really before the Court at this time. It's only in the abstract. But also, I—as I read §'s—well, the sections that were cited with regard to bringing commercial waste, commercial entities bringing their own, doesn't deal with —don't deal with haulers. It's simply a store operator, commercial entity. You can bring your own waste if it's segregated into recyclable and non-recyclable. You can bring it to the transfer station and there's no cost. Otherwise, you have to pay a $10 fee.

COURT: Well, you're—

MR. KATSIAFICAS: As to—I'm sorry, your Honor.

COURT: —I gather you're suggesting that there's something that—it doesn't—and this seems to be borne out by some of Mr. Dyer's arguments. I mean, Mr. Hart, for perfectly legitimate business reasons, I guess, would like to be able to deal with recyclable material in some way that might be more [18] advantageous to him in terms of the market. I mean, if he has to just bring it—if he just hauls it—

MR. KATSIAFICAS: Right.

COURT: —to the transfer station to be disposed of as waste, that doesn't, I suppose, do him much good, when there might be a market out there, arguably, for this recyclable material. That—he'd like to get into the market, is your position, with that recyclable material?

MR. KATSIAFICAS: Well, apparently. That's what he says. And what I'm saying is §'s (7)(G) and (H) talk about—(7)(G), "Any agreement for the collection, transportation and disposal of residential, commercial or industrial solid waste and recyclable materials shall be by private contract between the person and the commercial hauler," et cetera, and then (H), "Any agreements for the removal and collection of recyclable materials must provide that the materials will be received by the Town or its designee in marketplace condition." What I'm saying is that out of the universe of solid waste, we have recyclable materials. They're not separate and apart. Recyclables are within solid waste.

COURT: Right.

MR. KATSIAFICAS: And that was the decision of the Federal District Court in *The Town of Auburn versus* —excuse me—*Tri-State versus The Waste Management Company*. All of this material belongs to the Town and is pledged to RWS. If there's [19] any recycling to be done, it's through the Town. I don't read the ordinance to say that the hauler can't bring recyclables there. The question hasn't been raised, and it's not before the Court, because, in fact, Tri-State hasn't been bringing them there

and hasn't made any attempt to bring them there, as I understand it.

MR. DYER: Well, I'm going to object to that last comment, your Honor. There's nothing in the record to that effect, and if that fact is being asserted by Mr. Katsiaficas, I'd like to have the opportunity to have Mr. Hart testify that, in fact, he has spoken to Town officials on that very point, and has been denied access to the Town.

MR. KATSIAFICAS: All right. What is in the record is that since July 1, 1992, there has been no delivery of recyclable materials under this new ordinance to the transfer facility, and that's in the affidavit of Public Works Director Neal LaValley [sic]. And I'll simply rest on that. But I think that the ordinance is susceptible of allowing these people to bring their recyclable materials here. And we'll see where that goes. Finally, there's not only the cost of avoidance, there's not only the avoidance of administrative enforcement costs, but there's also the State recyclable requirements. First of all, we don't read the waste handling agreement as having been abrogated by 38, MRSA, § 1304(B), sub (4)(a). It simply provides that that agreement, the waste handling [20] agreement can't prevent the municipality from recycling more if it wishes to do so. The municipality wishes to recycle more. It was recycling 240 tons per year, approximately, at the time of the waste handling agreement. There is now an amendment to that waste handling agreement dated April 21st, 1992, and it's in the file, which allows the Town, by July of next year—of this year, excuse me, to recycle up to 550 tons per year, more than double what it had been recycling before. It—that's what the Town wants to do. RWS is its entity. RWS allowed that. And so there's no abrogation, here.

COURT: But that is, in fact—in order for the Town to do that, because it does have the effect of excluding waste in that amount from going to RWS—

MR. KATSIAFICAS: That's correct.

COURT: —I mean, RWS had to agree to that, is that correct? To allow the Town to increase its recyclable waste in that amount?

MR. KATSIAFICAS: That's correct, your Honor.

COURT: Okay.

MR. KATSIAFICAS: And that has been done. And that's—in order to help this city, the Town reached those recyclable goals set by the State. So those are the three reasons that the Town had in adopting this ordinance. We believe that that ordinance is rationally, reasonably related to those legitimate ends. It—people may differ as to whether it's the ideal [21] ordinance to effect that, but we're not looking for ideals, just that it be rationally related, and we think that it is.

COURT: Okay. All right. Mr. Dyer, you make the further argument that this scheme violates the commerce clause. And I'm trying to understand in what way that occurs, since it seems that most of the case law in this area, at least that has reached the Federal Courts and the U.S. Supreme Court, has involved efforts by states to restrict or put a heavy burden on the importation of waste into the state. And I'm trying to understand how that—those kinds of cases relate to this situation.

MR. DYER: Well, except for the *DeVito* [sic] case, which talked about taking waste from Rhode Island to Massachusetts to burn, as opposed to putting it in a landfill. And Rhode Island said, "We wanted a landfill. You can't burn it." So that's—there's a little bit of a twist on that particular case. But our position on the commerce clause is this, in the *Port Raddio* [sic] cases, *Chemical Waste Management versus Hunt* [sic], and the *Port Raddio Landfill* case, the U.S. Supreme Court said that, unequivocally, garbage is now a commodity. It's a valuable commodity being exchanged in trade throughout the United States. It has recoverable components in it which are of great value. And even without the recoverable components, as we have in this case, it is raw material for the generation of electricity which is sold

in [22] interstate commerce. So it is unequivocally a commodity traded in commerce. The question now is, in this particular case, I submit, would be the extent of the effect on interstate commerce, which is occasioned by this particular ordinance. Is this a serious impact or is it a marginal impact? And that's a factual question to be decided by the Court after hearing the evidence, and in hearing about how much material is being dealt with. In terms of EMWAC [sic], I can suggest to the Court that it appears that we're talking about 16,000 tons of recyclables a year. We're talking about 64,000 tons a year of waste generally. In RWS, we're talking a much larger amount of material. So we're talking, in the RWS context, in terms of controlling waste, we're talking a significant amount of material. What happens is when you have this restriction on where waste can be taken, which is an essential element in every one of these cases that's been decided, the *Shelley* [sic] case, the *DeVito* case, the *Fillaberro* [sic] case, the issue is does a state have the right to regulate where you take that material? And the most recent case, which is the Rhode Island case, *DeVito*, said, "You can regulate, as long as there's a rational reason for it." And it has to be something more than purely economic. It cannot—and in Rhode Island, it was—the question was whether they had to have the waste because they had to pay the bonds to develop the landfill. And that was considered to be insufficient by that particular [23] Court. So what we have here is a question in which we're torn. Are we taking the waste to RWS as part of a commercial project to supply inventory or fuel for the generation of electricity, or are we taking it to RWS and the transfer station in order to promote recycling and the reduction of waste? And I submit that what Gray is doing in this particular case is oriented towards a reduction of the waste stream and recycling. It has nothing to do with fueling RWS. In fact, RW—Gray is reducing that fuel stream.

COURT: Well, but it's—I mean, it's both. I mean, you've acknowledged this—these goals that, to some extent, are in conflict. The RWS was conceived, in large part, as an enterprise that would allow communities to solve their landfill problems, their solid waste disposal problems.

MR. DYER: That's correct. That's correct.

COURT: And it involves an alternative way of disposing of solid waste, and it becomes economically viable, in part, because the energy generated can be used to generate electricity and so forth. So there is an obligation to make this solid waste available to RWS, to meet its contractual commitments, to allow it to be financially viable. That was the initial impulse.

MR. DYER: That' right.

COURT: Now a few years down the road, there becomes this recognition that, even with these incinerators, we still [24] have a disposal problem. But yet—

MR. DYER: And we also have a continuing pollution problem.

COURT: —and—exactly. And so, it makes a lot of sense to try to recycle waste, as well. And that is somewhat counter to the interests of RWS, which lives off waste. So now you have to try to reconcile these two goals. And what you see, as Mr. Katsiaficas is describing, is the Town, pursuant to a State scheme, trying to try to balance. My point is those are both, are they not, legitimate objectives? Trying to get waste to RWS—

MR. DYER: Yes, they are.

COURT: —and at the same time, try to meet recycling goals. Those are rational objectives, and they're difficult to juggle. So what—even as you state the proposition, what is impermissible about the State—the Town trying to further those two objectives?

MR. DYER: Well, the commerce clause presents a very good focusing point, if you will, because what happense here in this contest between RWS and the Town,

between fuel and recycling, which—and that—those priorities, by the way, have been codified in Chapter 24, that incineration is now the fifth highest or next-to-last priority for disposal of waste. What happens in those—in that situation is that the Town is trying to control the waste stream in order to match the State recycling goals, and to make—honor its supply of fuel to RWS [25] by putting the waste hauler in the middle. They're taking an established business that's been around for twenty years, and they're saying, "We're going to make you the garbage policeman, and we're going to attach economic sanctions or taxes to your business in order to force the general public to recycle." And we're saying, "Wait a minute. Under the commerce clause, it may be a valid way to go—that the object may be valid, which is to create recycling, but to interfere in the commerce stream and interfere in business by achieving this is not right." That's not what—that's not the easiest or best alternative to go about doing that. There are several other ways. The Town's stated objectives for the ordinance, which are less than candid, I think, because they say that they want to preserve their administrative cost and they want to force people to recycle. But the fact—let's take those as valid. When you're talking about administrative costs, they're say—there's no—they're saying, "We have a sense that Mr. Hart will use the free tipping as a way to subsidize the rest of his business,, and we don't want that to happen." As a matter of fact, that's a criminal offense, according to Chief Chitwood and RWS. That's a criminal offense. It's diversion, it's embezzlement, it's operating under false pretenses, all that sort of thing. There are also sanctions applied to that, in terms of fines, loss of license. Those are the things that have operability. Those are the ways to go about controlling that sort of situation, [26] as opposed to saying to somebody, "I'm not going to go about doing this in this way." Now, relevant here is what other towns do and how they deal with the problem, which is considerably different than what Gray is doing. For example, in most other towns—

MR. KATSIAFICAS: We would object. We don't have any evidence on the record as to what other towns are doing in this, your Honor.

MR. DYER: Well—

COURT: Well, let me—

MR. DYER: —they represent all the other towns, so—

COURT: —well, let me—I don't—that might be interesting, but what I want you to tell me, Mr. Dyer, is what is it that you want your client to be able to do? What is it that, given his druthers, he would like to be able to do that he cannot do under this scheme?

MR. DYER: —okay. Under commercial accounts, what he would like to do with commercial accounts is he would like to say, "Okay. Let me put out two containers, one for recyclable materials and one for solid waste, in the true sense. Stuff that has been discarded. It's unwanted, unused,, unwanted, unneeded. And it is material that is solid waste in every sense. The other barrel, let me call that recyclable materials. Give me the option to take those recyclable materials to the transfer station and tip them for free. Or [27] let me take those materials to my own station, my own recycling process—or processing center, and recover the value myself." And we distinguish between the solid waste and the recyclable materials, and I can go into a long argument about solid waste and the authority of the State, but that's what he would like to do.

COURT: Now, if he's allowed to do that—well, first of all, even under the existing scheme, he was not allowed to do that, isn't that correct, because he can't—the Town has its own contractual commitment to RWS about what's going to happen to solid waste generated in the Town of Gray. He couldn't do that before this ordinance, isn't that correct? I mean, he can't—

MR. DYER: Well, yes—

COURT: —in other words, he can't just take it—he can't take solid waste generated in the Town of Gray wherever he wants to?

MR. DYER: —oh, no, no, no, no. No. He'd have to take it to RWS under the program which other towns have implemented and which we're suggesting here. He would take that solid waste to RWS and pay the tipping fee of $58 a ton for that commercial waste.

COURT: Oh, but it's the recyclable stuff he'd like to take where he wants?

MR. DYER: The recyclable stuff, which gives him an [28] opportunity, and his customers an opportunity, to recoup and reduce their costs by recycling, which is just exactly what the State and Gray want to achieve, here. As it stands now, he can't do that. There is no place for him that is legal to take the recyclable materials. The only person that can recover and reuse and dispose and sell those recyclable materials is the generator, who must take them himself to the Town transfer station, where they have the exclusive right to handle that material.

COURT: Well, the Town says that what that—that only—I think this is what the Town says, only in that fashion are they able to quantify what's happening to recyclable material and therefore, document the efforts they're making to meet the goals that the State says that these towns are to meet.

MR. DYER: No. That's not true. What—

COURT: That's not what they're saying, or that's not—

MR. DYER: —I don't believe that to be a true statement. They're saying that, "We have to have a toll station where all the waste goes through so we can count and see what happens." Well, that may be the bureaucratic way to go about doing it, but it's not the business way to go about doing it. We're faced with two disposal opportunities, here, generally speaking. We're faced with RWS, in which we have a quantified, known amount of waste which was dropped last year at RWS from The

Town of Gray. We know, for example, that if 100,000 tons of [29] solid waste went to RWS, that's documented. The rest of the material—and the goal talks about waste reduction. It doesn't talk about counting. It talks about waste reduction. So we know, if you take that 100,000 tons that went to RWS last year, and we reduce it down to 50,000 tons, we've met the goal, because the rest has to be recycled, or it's winding up on the back roads somewhere. And that recyclable waste and that recyclable activity is easily monitored that way. You don't have to have a toll booth to take everything through. It's management by exception. We don't need to interfere with commerce to that extent.

COURT: Okay. All right.

MR. DYER: With residential customers, Mr. Hart and his customers should have the same rights that every other residential person has. No other town that I know of imposes upon a resident the obligation to pay for his own tipping. In fact, I believe that flies in the face of § 1305—I think it's 1305—correct me if I'm wrong—which says that every town has an affirmative duty to provide waste disposal for its residents. And I think that it is—if you're going to charge some residents for the use of a mandated facility and not charge others, that's wrong. And what I'm saying with the residents is Mr. Hart should be able to pick up that material, solid waste, take it to RWS and have it paid for, just like anybody else. And it's easy to see whether or not he's comingling commercial [30] waste with that material. And other towns monitor at the RWS and EMWAC and every other landfill to make sure that the materials coming in bear some resemblance to the town. If you're taking Gray material in, and all of a sudden, somebody comes in with garbage and it's got all the mail addressed to Freeport, or it's got material that indicates that it came from Freeport in it, which is easily done—people do this all the time, then you can tell that somebody's cheating. And that's what's going on in RWS today.

Chief Chitwood and those people are doing that today. But he should be able to use that—Mr. Hart and his residential customers should be able to use RWS on the same basis as anybody else.

COURT: Mr. Dyer, it would seem to me that the—what Gray is doing is very similar to what the Town of Auburn was doing in the case that's been cited by the Town, here.

MR. DYER: Not entirely.

COURT: Okay. What is—

MR. DYER: Not entirely. In Auburn, we don't have the question of residential waste, because Auburn has its own municipal pick-up. So we don't have that issue. We do have the commercial waste question, and that argument was—the Auburn case was argued before the Maine Supreme Court yesterday. And Chief Justice Wathen pointed out—he said—I think it was Justice Wathen pointed out that there's—Judge Clifford said, "When somebody puts material in a container, that's [31] garbage, and that's the end of it." And was the key—one of the key parts in Judge Delahanty's decision. And I've taken issue with that as a factual basis in that particular case, saying there's no evidence in the record to support that kind of a conclusion. If the Court drew that conclusion sua sponte, that's not right. People today are—I mean, years ago—one argument made yesterday was that butcher shops and grocery stores used to set aside a box, and you put all the meat bones in it, and the rendering company would come by and pick those up. Now that's been going on for a hundred years. Now we have people setting—and they are statutorily mandated, in some cases, to set aside high-grade paper, to set aside corrogated board, and to do all these things. And to suggest that somebody, by throwing it away, is saying, "I am discarding it and I have no further use for it" is wrong, because in most of those instances which I've just mentioned to you, the generator is paid for the material or he barters a lower cost of disposal for that material.

And newspaper, for example, is now $15 a ton. And it can be sold for that, at $15 a ton. Now, it dosen't pay a hauler to come in and pay somebody for that newspaper, because he can't get enough money out of it to cover his hauling cost. But it is a useful discount to the price to be able to get that material. And those are the kinds of issue in the Auburn case which we argued yesterday, and which we believe the Law Court will—I hope the Law Court will agree [32] with our position on that, that we've got to look at the evolution of the statute from 1985, when RWS was first formed, through 1991 when these amendments and priorities were set by the State statute.

COURT: Finally, Mr. Dyer, in terms of your positions, the antitrust monopoly arguments that you make, it—

MR. DYER: That hangs on one issue. What's the definition of solid waste? The antitrust issue is does the State, in Chapter—in Title 30-A, intend to give the towns the exclusive right to handle all recyclable waste, regardless of the value? Does the town have the right to go into your house and say, "When you put the Cola Cola can down, it's discarded. It's now ours and we take the five cents." Does the town have the right to go to a sawmill and say, "You have to give us the sawdust." Those kinds of issues, and if the State definition of solid waste does allow that kind of activity, then we have no antitrust violation. If, however, Mr. Hart is permited to take recyclables and the State statute permits him to do that, and Gray intercedes and intervenes and says, "We want it," then we have an antitrust violation.

COURT: Okay.

MR. DYER: And a similar argument is made with taking, same kind of argument would apply there.

COURT: Okay. Mr. Katsiaficas, do you want to respond briefly to those points, the commerce cause and the monopoly, [33] and then I'll tell you what I've—what I'm inclined to do. Go ahead. I know you've done that in your brief. Why don't you just briefly restate it?

MR. KATSIAFICAS: Well, I will try to briefly restate that, your Honor. I—just for the big picture, there is a requirement that each municipality provide solid waste disposal services for domestic and commercial solid waste generated in the boundaries. It isn't a requirement that we provide it free of charge to all commercial and residential accounts within the town. We're not trying—The Town of Gray and RWS are not trying to put Tri-State or anyone out of business. It's simply trying to legitimately regulate those businesses. When we get to the commerce clause argument and the challenge to that regultory authority, first of all, there's no allegation here that Tri-State is engaging in interstate commerce. Tri-State is doing the collection, the disposal, the alleged recycling, whatever. They are the ones who we're looking at in this case. We're looking at what their actions are. There's no interstate commerce that's even indirectly implicated by what they do. There's no standing to bring those interstate commerce claims. Even if they did have standing to bring them, even if somehow interstate commerce were implicated, we believe that the cases cited by the plaintiffs, the *Port Raddio*, the *Alabama* case, are inapposite here because those cases deal with a prohibition on waste [34] entering a state, not a designation ordinance such as this. With regard to the Rhode Island case, again, that was a ban—that was an economic regulation that was designed to keep tipping rates artificially low for the municipalities by putting the burden on commercial waste and preventing it from leaving the state. We don't have that situation here. There are legitimate State ends being furthered, here. There's a tension between those State ends, but the Town is trying to do that in a way that balances everyone's interests, and in a fair way, and one that's rationally related to those ends. So, therefore, it's—it is not in violation of the commerce clause. With regard to antitrust, the definition of solid waste couldn't be clearer. It includes those items that are useless, discarded or unwanted, regardless

of whether they still have any value. That was decided by Judge Carter, in his decision where he found, under the very similar Auburn ordinance, using the State definition, that there was no violation of antitrust law. And with that, we'd just rest on the briefs, your Honor.

COURT: All right.

MR. DYER: Your Honor, my—perhaps I could make a suggestion at this point in time. It is obvious, from the arguments given to you by myself and by Mr. Katsiaficas in the last couple of moments, that many of the issues in this case will rest on the definition of solid waste. And it seems to me that since the Law Court heard this argument yesterday and is going [35] to be providing guidance—or hopefully, will be providing guidance in this area, that maybe the issues dealing with the affirmative defenses to the case or the affirmative claims in the case for antitrust violations and so forth should be deferred until the Law Court has spoken on that. And that would be for judicial economy, the avoidance of conflicting decisions and all those sorts of issues. And maybe what we could do is focus on—simply on the ordinance itself as to whether that is constitutionally defective, in terms of the access that Mr. Hart is to have to the transfer station and the ability to be treated equally under those things. And perhaps—I'm not sure that the Court can do this, but I think it can, make a division line in the case along those lines.

MR. KATSIAFICAS: If I may, your Honor?

COURT: Sure.

MR. KATSIAFICAS: Sorry.

COURT: Mr. Katsiaficas?

MR. KATSIAFICAS: I don't see that a division line can be drawn, here. But I would say that there are three counterclaims, one of them the licensing. It's very straightforward. There's no dispute as to that. There's no dispute that they're diverting acceptable waste. If there's any dispute over the definition of recyclable materials and whether those are exempt from full control, that

might be answered by the Law Court, perhaps that might be held in abeyance. But it's very clear [36] as to the first two counts of the counterclaim that we're entitled to summary judgment. There's no dispute of genuine issue of material fact.

MR. DYER: I think we can deal with the licensing question in terms of whether or not the application form is a bar to becoming licensed. And I think we can deal with that, and I'm prepared to argue that.

COURT: Well, let me tell you the dilemma that I have on this, gentlemen. And, Mr. Dyer, I have to say I think you're—you are doing a very good job arguing a very difficult position. I—and I'll be very candid with you that I feel that even on further reflection, I'm going to find it very difficult to accept your arguments. I mean, I don't want to shortchange you or your client in terms of the consideration that is given to this. What I'm saying is that if I take this under advisement for the purpose of giving a fully articulated response, it's going to be three months before I get this out, because I've got such a—frankly, a huge backlog of cases. And I'm saying to myself, given the reservations I have about your position, am I just taking all that time to try to give a more fully articulated statement of what I think the conclusion should be? Now, I can do that. The down side for you all is that you don't have a decision from me for all of that time. If I go forward now with a bench decision, it will not be, obviously, as fully articulated as it ideally [37] should be, and I'm concerned that your client may feel that he's been given short shrift, although I—I mean, I have read all this stuff, and I think I understand it. The —so, in a sense, I'm just sharing with you my own thought process as I decide what to do, here. I feel as that, frankly, in fairness to you all, is I should decide this here and now. And in doing that, I will not do it as fully as I might like, as I would like, but it allows you to know where you stand. And if I really felt there was a lot of uncertainty, here, I wouldn't do this. But I'm

going to tell you where I come out on all of this. And what that does is allow you to all move forward from there and perhaps get this more quickly to the forum where it ultimately has got to be decided. Where I come out on this, Mr. Dyer, and this will not be good news to you or your client, is that I begin with the proposition that this area of solid waste has been traditionally, for decades, an area where the municipality has had a great deal of authority to regulate, and to regulate in ways that have traditionally been monopolistic. I recently looked at some very old Maine cases going back to the turn of the century, where some of the very same arguments that you're raising now were raised about the authority of the town to basically grant a monopoly to a private enterprise to deal with offal and swill, as they called it then. And the Law Court was very clear that, in the town's exercise of its police power, that it could, in effect, [38] grant a monopoly to a business to carry out the function of disposing of the offal and the swill. My point is that—and I'm sure this must be very hard for Mr. Hart to accept, that he is conducting his business in an area which traditionally has been, and increasingly is becoming even more so, subject to heavy regulation. And, in a way, the stakes for the municipalities and the public interest become greater and greater all the time because of the increasing problems of solid waste. It seems to me what we have here is The Town of Gray, pursuant to its home rule powers, which are very substantial, and pursuant to the exercise of its police power, an area where it has a great deal of discretion, it is exercising its home rule powers and its police powers, to try to come up with a rational scheme for dealing with two not easily compatible objectives, number one, solving its landfill problems by meeting its obligations to RWS, and at the same time, meeting State-imposed obligations and mandates with respect to recycling more and more of its waste. And to meet those objectives in a way that is consistent with the Town's own limited financial re-

sources. And to some extent, Mr. Hart and others do find themselves in the middle of all of this, and it unquestionably is having an impact on the business of Mr. Hart and others, no question about that. But because they are conducting a business in this area, I'm afraid that that is a price that they are being asked to pay legitimately [39] by government regulation. I simply do not see anything in the Town's ordinance that violates equal protection, because, given the standard that applies, here, it seems to me that the Town has arrived at a rational scheme for addressing administrative costs, for trying to police the way in which waste is handled in The Town of Gray, in a fashion that is not unduly burdensome for them, and in a way that will help them meet their recycling goals. Now, you may say, as you have, that there are other ways that they could do that. And there probably are other ways that they could do it. And maybe even other ways that are more sensible, from a businessman's point of view. But I don't think that I, as a Court, have the authority to simply tell the Town that they ought to do it differently. They're doing it rationally to meet legitimate objectives, and I think they have the authority to do that. In terms of the commerce clause issues, I just—I mean, I recognize the grand scope of the commerce clause, and I'm reluctant to say that what the Town is doing does not have some effect on interstate commerce. But I can't imagine that what the Town is doing is having such an effect on interstate commerce that it violates applicable constitutional standards. The point is, again, that it seems to me they are pursuing a rational objective, and it does require, to some extent, that they control the destination of the waste. And in that sense, yes, it restricts the free flow of commerce, taking the view, as you have, correctly, [40] that waste is a commodity. Clearly, it is. And I believe, for all the reasons I've already stated, they can control the destination of that waste, and they're doing it for perfectly legitimate and rational reasons. I also take the view that

solid waste does have the broad definition that has been attributed to it by Judge Carter, and I believe, in the Auburn decision, as well, by Justice Delahanty, and that what we have here is the municipality acting pursuant to a clearly articulated and broadly stated State policy as to how these communities are to deal with solid waste, broadly defined. And becaues the Town is acting pursuant to that clearly articulated and broadly stated State policy, that, in effect, the Town is immune from these monopoly, these antitrust arguments that you're raising. It is the State action immunity, if you will, that applies in this area. I realize that you have raised other arguments, as well. I believe those are the primary ones, and I'm not going to try to address every one that you've raised, other than to say that I have reviewed them, and I do not—I did not feel that they ultimately had merit. Believe me, if I thought that taking this under further advisement and thinking about it and studying it was going to change those conclusions, I would not have done —made the decision that I now make. But I just know it won't, and therefore, it seemed to me that I had an obligation to you to state where I come out, to try to move this along. Now, [41] having reached those conclusions, I'm going to have to memorialize this other than just on the tape. I'm going to ask Mr. Katsiaficas to prepare an order that—and what I'm suggesting, Mr. Katsiaficas, I don't want you to try to sort of reproduce what I've tried to explain here. I mean, I want the record to stand for that. But what I think is needed now is an order that addresses what happens in light of those conclusions, I mean, because what we have here are—this all begins with Mr. Dyer's action on behalf of his clients, and obviously, this means that I am denying any request for injunctive relief. And I am ruling favorably on your counterclaim and basically giving you summary judgment on your counterclaim. Now, what that all—what that means further, frankly, in terms of the relief that you're seeking, I'm not sure. Maybe you can tell me now what

that means, from your perspective. I mean, it—I mean, the real effect of this would be a ruling that Mr. Hart has to be licensed, that he has to comply with the ordinance and all of those things. And I assume that's the kind of language that you would want in the order, making clear Mr. Hart's obligation to comply. Are you seeking more than that? Are you trying to look back, and are there claims for fines in here, and things like that? What is your—what are you seeking?

MR. KATSIAFICAS: We're simply—in this Motion for Summary Judgment, seeking to have Mr. Hart conform his conduct to the [42] requirements of the ordinance, to be licensed, to bring acceptable waste to RWS directly, and not to divert his recyclable materials, to not sell them to third parties or whatever. Those are the Town's properties, its solid waste.

COURT: Okay. So you're—

MR. KATSIAFICAS: We're not seeking fines.

COURT: —so you're looking for something prospective, then? I mean, this is what—

MR. KATSIAFICAS: Right.

COURT: —this is what Mr. Hart would now have to do, is that correct?

MR. KATSIAFICAS: That's correct.

COURT: Okay.

MR. KATSIAFICAS: And we are not seeking fines.

COURT: All right. Okay. All right. Well, that's helpful to know—

MR. DYER: Well, I have a question.

COURT: —sure.

MR. DYER: He says he dosen't want recyclables diverted. Where's Mr. Hart supposed to take them?

COURT: Do you want to respond to that, Mr. Katsiaficas?

MR. KATSIAFICAS: I've suggested earlier that those could be taken to the Town's municipal recycling facility at the transfer station, and—

MR. DYER: He's been refused permission to go there. [43] COURT: Well, that's something I guess you'll have to look into, Mr. Katsiaficas.

MR. KATSIAFICAS: —I'll have to look into that, but that would be reflected in the draft order that I prepare.

COURT: Right. Okay.

MR. DYER: Now, I also assume that this is going to apply to every single other waste hauler in the community, because there are other waste haulers who are not doing that. They are not taking their recyclables to the transfer station.

COURT: Well, I'm sure that any policy that's reflected in this order would have to be uniformly applicable. I mean, that—

MR. KATSIAFICAS: That's right. I'm not aware of what other haulers are doing at this time, and any policy that is adopted here would have to be applied across the board in order to be fair.

MR. DYER: Well, we pointed this out to them, that within one hundred feet of the front door to the Town Hall is a waste management recycling bin which is not being taken to the transfer station.

COURT: Hmmm? Okay. Well, that's something that clearly bears examination, Mr. Katsiaficas.

MR. KATSIAFICAS: Certainly, your Honor. That will be examined before I draft the prepared order.

COURT: Okay. Mr. Dyer, from your point of view, is there [44] understanding, sort of where ultimately I'm coming out on this? Is there anything that you feel should be—in terms of dispositive provisions of the order that has to be addressed, just so your client knows where he stands for purposes of appeal land all of that. What—

MR. DYER: Well, I have a couple of questions for appeal, which I like to raise.

COURT: —sure.

MR. DYER: I've restrained myself from continuing the argument this morning, but—

COURT: I understand.

MR. DYER: —obviously, we're going to need some sort of a record to take up on appeal.

COURT: Sure.

MR. DYER: We can either take this transcript this morning, or we could have findings of facts and conclusions of law.

COURT: Well, see, what—that's—I—mean, I'm just not comfortable—I never have been—asking counsel to give me those to—it just doesn't—it just never seems to work for me. And I was hoping to—what I have asked you to do, it seems to me, is—I've tried to give a bench decision which explains where I'm coming from, at least without undue cost. That portion, it seems to me, could be obtained—

MR. DYER: All right. So you would have us rely on the [45] record?

COURT: —right.

MR. DYER: Fine.

COURT: So what I'm really doing is—and obviously, you can have this whole colloquy reproduced if you think that's helpful, but what I'm suggesting to Mr. Katsiaficas is, for the—basically for the reasons stated on the record, and then the transcript would be that, and then these—and I haven't made factual findings, because I have—I mean, you all started out with a proposition which seemed very clear to me that these are really legal issues. There's —now, there seems to be some dispute about how the Town might be applying one provision of the ordinance you've just referred to. But I never saw this as a—where there's much factually in dispute at all, really nothing. I mean, these are legal issues, as you've said right along. So I don't think there's a need to make any factual findings. As least, I've proceeded on that assumption. And so I just tried to give you a summary of my legal conclusions, if you will, and that's now on the record. So I would prefer to just have an order which deals with the respective claims, and indicates how those are disposed of,

make sure they're all disposed of so you have a final judgment, and you can proceed accordingly.

COURT: Now, I also assume—well, I understand that there are no fines that are being assessed at this point in time?

[46] COURT: That's what Mr. Katsiaficas just said. Right.

MR. DYER: All right. Now, obviously, I'm going to ask for the Court to stay the order, pending appeal. There are some appealable issues here, which I—

COURT: Sure. Absolutely.

MR. DYER: —the California reduction case, which I think you were talking about earlier, being those old turn of the century California cases decided by the U.S. Supreme Court—

COURT: Well, I—actually, I was thinking of some Marine cases, at least in terms of monopoly—the monopoly problem. Yeah.

MR. DYER: —there is an old—I think a rendering plant case of some sort in Maine, if I'm not mistaken, which is about the same time as the U.S. Supreme Court cases.

COURT: Yeah. Okay.

MR. DYER: And the question of whether or not this is a regulated industry, I will—I tend to take exception to that.

COURT: Sure.

MR. DYER: And disagree—I understand your position, and I don't mean to be disrespectful here in any way. But—

COURT: That's—that's—I mean, I'm—these are difficult issues, and I think, as I said, it made point—it made sense to me to get this resolved so you can get it decided where it ultimately has to be decided. So—

MR. DYER: —my position would be essentially that recyclables [47] is a new industry. And the recent Supreme Court cases this year indicating that they are commodities, that they are valuable items, and the recent cases

dealing with commerce clause issues all point out the fact that this recyclable industry is very critical. And when you start saying, "Yes, we'll take the broad definition of solid waste," then you start impacting metals processors, newspaper processers, the bottled glass people, all of these industries are going to be impacted one way or another by these kinds of—by this definition. And therefore, we would like to have some relief during the course of this appeal, that I under—I assume that you have no sense of allowing Mr. Hart to continue taking the material to the least costly disposal facility. You are going to require, under any set of circumstances, he take the acceptable waste to RWS. However, we would like to have the opportunity to be able to take the recyclable materials to a third party processor, if, in fact, it proves to be more economical to do that. And it may very well turn out not to be economical because of the volume of recyclable materials being generated. It may be easier just to tip it, rather than to truck it to West Paris in separate trips and so forth. But we would like to have the opportunity to—at least to try and protect that economic situation during the course of the appeal.

COURT: Well, I wonder if we—it's—we've all been at this [48] a long time, and I wonder if maybe we ought to just schedule a separate hearing on the issue of whether a stay should be—whether there should—that—we should —I think maybe that would make—

MR. DYER: And I could phrase it in writing and—

COURT: —yeah.

MR. DYER: —give you a proposed order of specifically what we want?

COURT: Why don't we do that? I'd just as soon—that's obviously also an important issue, and I think I'd rather give separate consideration to that. So why don't we get the—see if, in light of what I've indicated, you and Mr. Katsiaficas can agree on the terms of the order to reflect these rulings, and then after you've done that, I'll make myself available promptly to hear the issue of the stay. I mean, I guess what you'd want to do is—maybe

at the time that you submit the order, you could also submit your—each submit your position on the issue of the stay.

MR. DYER: All right.

COURT: And then I'll—

MR. DYER: And what I will do, Judge, if it's all right with you, I will phrase the request for relief broadly, on the basis that it's better to ask for too much than too —for too little.

COURT: —well, I—

[49] MR. DYER: And you can strike whatever—

COURT: yeah.

MR. DYER: —you deem to be appropriate.

COURT: Okay. And then I won't sign or enter the order until we've had the hearing on the stay, okay?

MR. DYER: All right. Fine.

COURT: And—all right. Why don't we do that? And just so the Clerk can keep track of this, how long do you think you would need to prepare the order and, at the same time, have your respective positions on the stay? A couple of weeks? A week? I don't know.

MR. KATSIAFICAS: I would think that a week would be sufficient, your Honor.

COURT: Okay. All right. Why don't you do that, and then I'll—after I get that, I'll have Amanda, the sec—I'll check with you, we'll set up a time, then, for the hearing on the stay. I think we'll—you'll want to argue that, I assume, is that right?

MR. KATSIAFICAS: Yes, your Honor. We will.

COURT: Okay. Then we'll—

MR. DYER: As a matter of housekeeping, is it all right if we agree to exchange pleadings by close of business on Monday and file on Tuesday, a week from today?

MR. KATSIAFICAS: Well, we'll try to get, actually, a draft order before that, to you.

[50] MR. DYER: Well, all right. So that I have an opportunity to look at them (indiscernible).

MR. KATSIAFICAS: Well, we certainly—we want —we have to agree to an order, I believe.

COURT: I'm asking you to try to—I think—that part, I don't think should be difficult.

MR. KATSIAFICAS: And I'm going to try to—I would think not, your Honor.

COURT: Yes, I'm just asking you to dispose of the —all the claims. I think the stay issue would be the difficult one, so—

MR. KATSIAFICAS: That's right.

COURT: —all right. Thank you.

MR. KATSIAFICAS: Thank you, your Honor.

END OF HEARING

APPENDIX E

TOWN OF GRAY
SOLID WASTE, FLOW CONTROL AND RECYCLING ORDINANCE

AN ORDINANCE OF THE TOWN OF GRAY, CUMBERLAND COUNTY, STATE OF MAINE REGULATING THE COLLECTION, STORAGE, TRANSPORT, DISPOSAL REDUCTION, RECYCLING AND REUSE OF SOLID WASTE IN THE TOWN AND PROVIDING PENALTIES FOR THE VIOLATION OF SAID ORDINANCE.

WHEREAS, the Legislature of the State of Maine has caused certain statutes to be enacted which govern or delegate to the Maine Department of Environmental Protection the responsibility for promulgation of rules and regulations regarding the disposal of solid waste and authorize municipalities to regulate solid waste disposal on municipal property; and

WHEREAS, the Council of the Town of Gray pursuant to the authority vested in it, desires to enact an ordinance regulating the collection, storage, transport, salvaging and disposal of garbage, rubbish, refuse, and other solid waste materials in said Town; and

WHEREAS, the Town of Gray has the authority pursuant to 30-A M.R.S.A. section 3001 et seq., and 38 M.R.S.A. section 1301 et seq. as amended from time to time, to enter into contracts for the collection, transportation, storage, processing, salvaging or disposal of solid waste and to designate certain categories of solid waste as recyclable or reusable material and to require the segregation of waste into categories; and

WHEREAS, reduction, recycling and reusing is a wise and prudent solid waste management technique that saves tipping fees, saves energy, reduces pollution and environ-

mental degradation, keeps usable manufacturing material in the economy and signifies a developing sense of waste awareness; therefore, the Town of Gray wishes to encourage reduction, recycling and reusing to the maximum extent possible; and

WHEREAS, the Gray Landfill will be permanently closed December 31, 1991; and,

WHEREAS, the Council desires to gain management control over solid waste and enable the reclamation of resources, including energy, from those wastes; and

WHEREAS, the Council desires to provide adequate, efficient services and facilities for the disposal of solid waste without creating an undo financial burden on property owners;

THEREFORE, be it enacted and ordained by the Town of Gray, Cumberland County, Maine and it is hereby enacted and ordained by authority of the same as follows:

SECTION I

SCOPE:

This Ordinance applies to all generators of solid waste in the Town of Gray, including but not limited to, residential, commerical, industrial and governmental producers of solid waste in the Town of Gray.

SECTION II

DEFINITIONS:

The following words and terms as used in the Ordinance shall have the meaning ascribed thereto, unless the context indicates a different meaning. Further definitions may be found in Bureau of Solid Waste Management 06-096 CMR 400.1

"*Abandoned Vehicle*"—Any gasoline, diesel or electric powered equipment, or part thereof, originally designed

for carrying persons or goods for commercial, business, private or recreational purposes which is:

1. No longer used for the purpose originally intended,
2. Has not been converted to another commercial, business, private or recreational vehicular use,
3. Is not exempted or regulated by existing State or Federal Laws, or
4. Has been left out in the elements to deteriorate.

It includes, but is not limited to, automobiles, trucks, buses, campers, trailers, boats, snowmobiles, jet skis and ATVs.

"*Acceptable Waste*" shall mean ordinary household, municipal, institutional, commercial and industrial Solid Waste including, but not limited to, the following:

(1) Garbage, trash, rubbish, paper and cardboard, plastics, refuse, beds, mattresses, sofas, refrigerators, washing machines, bicycles, baby carriages and automobile or small vehicle tires, to the extent that Regional Waste Systems, Inc. (RWS) determines that the air emission criteria and standards applicable to and at the RWS Disposal Facility are not violated; and

(2) Processible portions of commercial and industrial Solid Waste; and

(3) Wood and lumber, tree limbs, branches, ties, logs and trees, if no more than four and one-half (4 1/2) feet long and eight (8) inches in diameter, and leaves, twigs, grass and plant cuttings, provided that the Municipality shall not be obligated to deliver or cause to be delivered any items listed in this subpart (3) to the RWS Disposal Facility, and further provided that such items may be delivered to the RWS Disposal Facility by or on behalf of the Municipality on an irregular basis only and shall represent an insignificant portion of the total Waste

delivered to the RWS Disposal Facility by or on behalf of the Municipality within any Calendar Year; and

Notwithstanding any provisions to the contrary, Unacceptable Waste, including Hazardous Waste, shall not be "Acceptable Waste" and is explicitly excluded therefrom. Furthermore, any substances which as of the date of a certain Waste Handling Agreement between the Municipality and Regional Waste Systems, Inc. (RWS) are included as "Acceptable Waste", by which are later determined to be harmful, toxic, dangerous or hazardous by any governmental agency or unit having appropriate jurisdiction, shall not be "Acceptable Waste" under the terms of this Ordinance. However, any substances which as of the date of said Waste Handling Agreement are not included within the definition of "Acceptable Waste" because they are considered harmful, toxic, dangerous or hazardous and which are later determined not to be harmful, toxic, dangerous or hazardous by any governmental agency or unit having appropriate jurisdiction, shall be considered "Acceptable Waste" unless a contrary determination has been or is made by any other governmental agency or unit having appropriate jurisdiction or unless such substances are otherwise considered "Unacceptable Waste" or "Hazardous Waste".

"*Agricultural Waste*" also referred to as "waste resulting from agricultural activities" in 38 MRSA Section 1303. (16), means wastes which result from agricultural activities defined in Section 361-A (1-B), which are returned to the soils as fertilizers. It includes waste pesticides when generated by a farmer, provided that he/she triple rinses each emptied pesticide container in accordance with departmental rules and disposes of the pesticide residues in a manner consistent with the disposal instructions on the pesticide label. It does not include any materials regulated as a residual under Chapter 567 of the Department's Regulations.

"*Ashes*"—the residue remaining after the combustion of a material such as wood, coal, coke or other combustible material.

"*Brown Goods*"—small household appliances including, but not limited to, radios, televisions, sound systems and other small electric or electronic appliances or devices.

"*Commercial Hauler*—Any person, firm, partnership, association, municipality, cooperation, or other legal entity who collects, transports, and disposes of solid waste for a fee as herein prescribed.

"*Commercial Waste*"—solid wastes generated by stores, offices, restaurants, warehouses and other non-manufacturing, non-processing activities; but it does not include residential, household, process, industrial or special wastes.

"*Composting*"—the biological decomposition and stabilization of organic matter under controlled aerobic conditions of high temperature.

"*Construction/Demolition Debris*"—the debris resulting from construction, remodeling, repair and demolition of structures. It includes but is not limited to building materials, asphalt, wall board, pipes, metal conduits, mattresses, household furniture, fish nets, rope, hose, wire and cable, fencing, carpeting and underlay. It excludes asbestos, gypsum board, asphalt shingles, plastics, cans, containers which stored asphalt, paint thinners or other similar materials and material that contains or is combined with residential refuse, rubbish, garbage, hazardous or special wastes, as that term is defined by Chapter 400 of the Maine Department of Environmental Protection's Solid Waste Rules.

"*Demolition Debris*"—see "Constructon/Demolition Debris."

"*Disposal*"—the discharge, deposit, dumping or placing of any solid waste into or on any land or body of water, or the incineration of any solid waste.

"*Disposal Facility*"—any land or structure or combination of land area and land structures, including dumps, recycling centers, and transfer stations used for storing, salvaging, reducing, incinerating or disposing of solid wastes, including any transfer station or similar facility which may be constructed by the Town in connection with the use of any disposal facilities.

"*Garbage*"—all table refuse, animal and vegetable matter, offal from meat, fish and fowls, vegetables and fruits and parts thereof, and other articles and materials ordinarily used for food and which have become unfit for such use or composting for which reasons they are discarded.

"*Hazardous Waste*"—a waste substance or material, in any physical state, designated as hazardous by the Board under 38 M.R.S.A. Section 1303-A et seq. The fact a hazardous waste or a part or a constituent may have value or other use or may be sold or exchanged does not exclude it from this definition.

"*Industrial Waste*"—solid wastes generated by manufacturing or processing activities; but it does not include residential, household, commercial or special wastes.

"*Inert Fill*"—a clean solid material, rocks, bricks, and cured concrete, which are not mixed with other solid or liquid waste, and which are not derived from an ore mining activity.

"*Infectious Waste*"—those wastes so defined by the Solid Waste Management Regulations promulgated by the Department of Environmental Protection pursuant to Title 38 M.R.S.A. section 1304.

"*Land Clearing Debris*"—solid wastes resulting from the clearing of land and consisting solely of brush, stumps, soil material and rocks.

"*Landscape Refuse*"—grass, leaves, shrubs, branches, trees and wood, whether finished or unfinished; but it

does not include construction/demolition debris, land clearing debris, plastic bags or other plastic containers used to collect, store or transport landscape refuse.

"*Person*"—any individual, partnership, association, firm, company, corporation, department, agency, group, including a city, town, county, State, Federal or other governmental unit, or any other entity responsible in any way for an activity subject to these rules.

"*Recyclable Waste*"—waste, which when properly segregated, can be recovered, reused, or recycled. This shall include with limitation, newspapers, corrugated box material, glass and metal containers, scrap metal, waste oil, mixed paper, automotive batteries, white goods, brown goods and other materials deemed recyclable by the Town.

"*Recycling Center*"—a portion of the Transfer Station set aside for the collection, segregation, processing, storage and distribution of recyclable and reusable solid waste.

"*Refuse*"—all combustible refuse and incombustible refuse referred to collectively.

"*RWS or Regional Waste Systems, Inc.*"—shall mean Regional Waste Systems, Inc., a non-capital stock, nonprofit corporation created pursuant to Title 30, Chapter 203 and Title 13, Chapter 81 of the Maine Revised Statutes.

"*Residential Waste*"—solid wastes generated by a residence during normal household activities; but it does not include commercial, process, industrial, landscape, construction/demolition debris or special wastes.

"*Resource Recovery*"—the recovery of materials or substances that still have useful physical or chemical properties after serving a specific purpose and can be reused or recycled for the same or other purposes.

"*Rubbish*"—all miscellaneous waste material, not otherwise included herein, resulting from the ordinary conduct of business or housekeeping.

"*Solid Waste*"—useless, unwanted or discarded solid material with insufficient liquid content to be free flowing, including by way of example, and not by limitation, rubbish, garbage, refuse derived fuel, scrap materials, junk, refuse, inert fill material, and landscape refuse. "Solid Waste" shall in no case include sludges from air or water pollution control facilities, septic tank sludge or agricultural waste. The fact a solid waste, or a part of or constituent of the waste, may have value or other use or may be sold or exchanged does not exclude it from the definition of "Solid Waste".

"*Special Wastes*"—as defined in 38 M.R.S.A. Section 1303 (10-B) means any non-hazardous waste generated by sources other than domestic and typical commercial establishments that exist in such an unusual quantity or in such a chemical or physical state, or any combination thereof, which may disrupt or impair effective waste management or threaten the public health, human safety or the environment and requires special handling, transportation and disposal procedures. Special waste includes, but is not limited to:

a. Oil, coal, wood and multifuel boiler and incinerator ash;

b. Industrial and industrial prices waste;

c. Wastewater treatment plant sludge, paper mill sludge and other sludge waste;

d. Debris and residuals from nonhazardous chemical spills and cleanup of those spills;

e. Contaminated soils and dredge spoils;

f. Asbestos and asbestos-containing waste;

g. Sand blast grit and nonliquid paint waste;

h. Medical and other potentially infectious or pathogenic waste;

i. High and low pH waste;

j. Spent filter media residue;

k. Shredder residue; and

l. Other waste designated by the board, by rule.

"*Town*"—the Town of Gray, Cumberland County, State of Maine.

"*Transfer Station*"—Transfer Station means any waste facility constructed and managed for storage and placement of municipal solid waste in large containers or vehicles for movement to another waste facility.

"*Unacceptable Waste*"—that portion of solid waste which is not acceptable waste and includes, but is not limited to, sewage and its derivatives, special nuclear or by-product materials within the meaning of the Atomic Energy Act of 1954, as amended, and Hazardous Waste, and Special Waste.

"*Waste*"—items, materials or substances delivered to a disposal Facility by the Town, its employees, agents or contractors.

"*White Goods*"—all large appliances, including, but not limited to, stoves, refrigerators, freezers, washing machines, clothes dryers, dishwashers, air conditioners and metal artifacts such as swing sets, bicycles and lawn mowers free of all oil and gasoline. White goods shall not include white goods generated by an owner or operator of a commercial or industrial use or activity.

SECTION III

DISPOSAL FACILITY:

A. To preserve and protect environmental resources, to protect the health, safety, and welfare of the public, to

enhance the quality and character of life in the Town and to improve efforts to recover and reuse valuable resources currently being wasted, it shall be unlawful to dispose of acceptable waste generated within the Town at any location other than the Town Transfer Station, RWS facility at 64 Blueberry Road in Portland, Maine, or other licensed facility designated by the Town Council.

B. The Town shall inform all persons of the location of the Transfer Station by adequate public notice in writing or in print. Furthermore, the Town shall inform all persons authorized to use the Transfer Station of the proper location for disposing of the various components of their solid waste including, but not limited to, recyclable materials, reusable materials, white goods, brown goods, landscape refuse, construction/demolition debris, land clearing debris, tires, ashes, spent motor oil and all other solid wastes.

C. Property Rights

Any solid waste deposited within the boundary of the Town shall become the property of the Town or Regional Waste Systems, Inc., pursuant to the terms of a Waste Handling Agreement entered into between RWS and the Town and amendments thereto. No one shall salvage, remove or carry off any such deposited solid waste without prior approval of the Public Works Director or his designee.

D. From and after the effective date of this ordinance, it shall be unlawful for any person or firm to accumulate, or permanently dispose of within the corporate limits of the Town, abandoned vehicles, garbage, refuse, rubbish, combustible or incombustible refuse, white goods, brown goods, recyclable or reusable material or other solid waste generated within said Town excepting inert fill material, compost and other material for which specific permission has been granted by the Town. Failure to remove any existing accumulation of garbage, refuse, recyclable materials, rubbish, abandoned vehicles or other solid waste

materials within thirty (30) days after the effective date of this ordinance shall be deemed in violation of this section of the ordinance.

E. Nothing in this subsection shall prohibit any person from composting vegetable and plant materials on his/her property for noncommercial use.

F. The owner of any lot, or any other person with the permission of the lot owner and Code Enforcement Officer, may deposit or dump inert substances such as earth, rocks, concrete or similar material for fill purposes only, subject to State and/or local Land Use Regulations.

G. Certain materials may be excluded by Town Council Regulation from those solid waste materials which may be deposited at the Transfer Station. These excluded materials may include white goods, brown goods, tires, ashes, ties, spent motor oil, commercial waste, industrial waste, land clearing debris, landscape refuse, construction/demolition debris, abandoned vehicles and bulky or special waste which may require special processing prior to disposal.

H. Except for licensed disposal of hazardous, special or infectious wastes, it shall be unlawful for any person to burn or incinerate any solid waste within the Town other than wood products, trees, tree limbs, branches, ties, logs, leaves, twigs, grass and plant cuttings, other than in an approved incinerator. Ref: State of Maine Rules and Guidelines for Open Burning, 38 M.R.S.A. Section 599 and Department of Conservation, Bureau of Forestry 12 M.R.S.A. sections 9301 and 9324.

SECTION IV

AUTHORIZED USE OF THE TRANSFER STATION:

A. The availability and use of the portions of the Transfer Station located within the Town shall be limited to the residents of the Town, both permanent and seasonal,

for the sole purpose of disposing of solid waste generated within the Town. As a means of use control, the Town may distribute vehicle permits to authorized users which shall be affixed to use vehicles. Failure to exhibit such permit shall result in denial of use of the facilities.

B. Waste generated at a commercial activity which has been segregated into recyclable, reusable and non-recyclable categories, and is hauled by the generator of the waste, may be deposited at the Transfer Station.

SECTION V

TRANSFER STATION USER CHARGES:

Upon reviewing recommendations made by the Town Manager and Public Works Director, the Town Council may establish by order schedules of waste disposal charges, operating hours, delivery times and other operating regulations for the use of the Transfer Station or any portion thereof located within the Town, which schedules may include different waste disposal charges, operating hours, delivery times and other operating regulations for residents of the Town, businesses located within the Town and commercial refuse collectors collecting solid waste within the Town and may include different schedules for disposal of different kinds of solid waste. All schedules to be on file in the Town Clerk's office.

SECTION VI

RESTRICTIONS:

A. Hazardous Waste cannot be deposited at the Transfer Station. The Town shall not be responsible for any costs or liabilities incurred with the disposal of Hazardous Waste.

B. Special Waste cannot be deposited at the Transfer Station. The Town shall not be responsible for any costs or liabilities incurred with the disposal of Special Waste.

C. Infectious Waste cannot be deposited at the Transfer Station. The Town shall not be responsible for any costs or liabilities incurred with the disposal of Infectious Waste.

D. Agricultural Waste cannot be deposited at the Transfer Station. The Town shall not be responsible for any costs or liabilities incurred with the disposal of Agricultural Waste.

E. Commercial Waste, hauled by the generator of the waste, which has not been segregated into recyclable, reusable and nonrecyclable categories shall be deposited at RWS or other licensed facility designated by the Town Council. The Town shall not be responsible for any costs incurred with the disposal of nonsegregated Commercial Waste hauled by the generator.

F. Construction/Demolition debris can be deposited at the Transfer Station or other location designated by the Town until an alternate Construction/Demolition Debris site is in operation. The Town shall not be responsible for any costs or liabilities incurred with the collection, storage, transport, or disposal of Construction/Demolition Debris.

G. Land Clearing Debris can be deposited at the Transfer Station or other location designated by the Town until an alternate Construction/Demolition site is in operation. The Town shall not be responsible for any costs or liabilities incurred with the collection, storage, transport or disposal or Land Clearing Debris.

H. Landscape Refuse can be deposited at the Transfer Station or other location designated by the Town until an alternate Construction/Demolition Site is in operation. The Town shall not be responsible for any costs or liabilities incurred with the collection, storage, transport or disposal of Landscape Refuse.

I. Owners or operators of a commercial or industrial use or activity cannot deposit white goods or brown

goods at the Transfer Station. The Town shall not be responsible for any costs or liabilities incurred with the collection, storage, transport or disposal of white goods or brown goods from a commercial use or activity.

J. Industrial waste cannot be deposited at the Transfer Station. The Town shall not be responsible for any costs or liabilities incurred with the collection, storage, transport or disposal of industrial waste.

K. It shall be unlawful for any person to place, leave or deposit at the entrance of, or along the perimeter fence of the Transfer Station, any garbage, refuse, recyclable materials, rubbish, white goods or other solid waste materials during, or outside of the hours of the day and the days of the week which the Town Council has determined those facilities open for the disposal of solid waste materials.

SECTION VII

REGULATION OF COMMERCIAL HAULERS:

A. It shall be unlawful for any person to haul, transport, collect, remove and dispose of garbage, refuse, recyclable/reusable materials, rubbish, white goods, brown goods, or other acceptable waste generated within the Town for a fee without first securing a commercial hauler's license. The Town, upon application and after investigation, may issue a commercial hauler's license for a period of one (1) year.

B. The fee for a hauler's license shall be established by Town Council Order. Any person desiring to secure such a license shall present a written application accompanied by the fee, to the Town Clerk; such license shall be issued only after due and proper investigation and recommendation of the Public Works Director and Public Safety Officer and after approval by the Town Council.

C. An application for an annual or a limited commercial hauler's license shall contain the following information:

1. The name of the applicant,
2. The applicant's residence,
3. The address of the applicant's place of business,
4. A description of equipment to be used,
5. A collection route and schedule,
6. Place(s) of deposit of solid waste,
7. A Certificate of Insurance for:
    a. Workers Compensation Insurance covering all employees,
    b. Vehicle Liability for a minimum of $1,000,000.00,
    c. Comprehensive General Liability for a minimum of $1,000,000.00.

D. The Commercial Hauler shall deposit all residential, commercial and industrial acceptable waste generated within the boundaries of the Town at the Regional Waste Systems, Inc. facility or at any other licensed solid waste facility or facilities as may be designated by the Town Council. The Town shall not be responsible for the collection, transport or disposal of any residential, commercial or industrial acceptable or non-acceptable waste.

E. Trucks or other vehicles used for the transportation of garbage or other garbage mixed with refuse shall be of the compactor type, water tight, with an enclosed cargo space. Collection of dry refuse, rubbish, recyclable, and other solid waste materials is permitted in open trucks which shall be covered. No trucks or other vehicles shall be permitted to scatter any of the contents on any of the streets, highways, or roads of the Town. Trucks used to haul garbage refuse, recyclable materials, rubbish, or other soild waste materials over the streets of the Town must be maintained in a clean and sanitary condition and shall meet all the requirements of the Town or appropriate State agency where applicable. The trucks may be inspected at

any time during normal collection hours by the Public Works Director or his designee. Any deficiencies must be corrected within 48 hours by the commercial hauler. Trucks must be cleaned before handling recyclable materials.

F. With prior notice and hearing, licenses and renewals of licenses may be denied and any license issued pursuant to the provisions of this ordinance may be revoked by the Town Council upon failure of the licensee to comply with any of the provisions of this ordinance, or with any of the regulations of the State of Maine, Department of Environmental Protection, relating to the collection and disposal of garbage, refuse, recyclable materials, rubbish, white goods or any other solid waste materials. License fees are non-refundable. An aggrieved party may appeal a license denial or revocation to Superior Court pursuant to Rule 80B within 30 days of such denial or revocation.

G. Any agreement for the collection, transportation and disposal of residential, commercial or industrial solid waste and recyclable materials shall be by private contract between the Person and the Commercial Hauler licensed for the purpose of collecting, removing, hauling and disposal of such garbage, recyclable materials, refuse, rubbish, white goods, brown goods, and other solid waste materials.

H. Any agreements for the removal and collection of recyclable materials must provide that the materials will be received by the Town or its designee in marketable condition.

SECTION VIII

DISPOSAL OF CONSTRUCTION/DEMOLITION DEBRIS, LAND CLEARING DEBRIS AND LANDSCAPE REFUSE

A. Only residents of the Town and owners of property located within the Town may dispose of Construction/ Demolition Debris, Land Clearing Debris and Landscape

Refuse at the Transfer Station or at any other licensed location designated by the Town.

B. Disposal shall occur in accordance with regulations determined from time to time by vote of the Town Council and only in the presence of a Town employee or agent.

C. Contaminated Construction/Demolition Debris, Land Clearing Debris and Landscape Refuse, cannot be deposited at the Transfer Station. The Town shall not be responsible for any costs incurred with the disposal of Contaminated Construction/Demolition Debris, Land Clearing Debris and Landscape Refuse.

SECTION IX

ADMINISTRATION:

A. The Town Council may establish by order the rules and regulations governing the availability and use of the Transfer Station. The operation of the Transfer Station shall conform to all pertinent regulations and directives of all local, county, state or federal agencies which may have jurisdiction.

B. It shall be the duty of the Director of Public Works to enforce the provisions of this ordinance.

SECTION X

PENALTIES FOR VIOLATION:

Any person or firm who shall violate or fail to comply with any of the provisions of this ordinance shall:

A. Be punished by a fine, as established by Town Council Order, per violation plus costs which fine shall be recovered on complaint to the use of the Town. Each day upon which any continuing violation of any provision of this Ordinance shall occur shall constitute a separate violation, and each incident of disposal of Solid Waste in violation of this Ordinance shall constitute a separate vio-

lation. In addition, the Town may seek equitable relief, including but not limited to injunctive relief and indemnification of the Town's liquidated damages to RWS, and attorney's fees and costs to ensure compliance with the terms of this Ordinance.

B. Pay the actual costs to remove and dispose of solid waste.

C. Pay for any damages to the Town's facilities or equipment caused by said violation.

D. Be prohibited from using the Transfer Station, after notice and hearing for a period of six (6) months by the Town Manager upon recommendation of the Director of Public Works or his/her designee. An appeal to this prohibition may be made to the Town Council within fourteen (14) days from the notice upon request. Furthermore, an aggrieved party may appeal to Superior Court pursuant to Rule 80B.

SECTION XI

SEVERABILITY:

If any sentence, clause, or section or part of this ordinance is for any reason found to be unconstitutional, illegal, or invalid, such unconstitutionality, illegality, or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses, or sections or parts of this ordinance. It is hereby declared as the intent of the Town that this ordinance would have been adopted had such unconstitutional, illegal, or invalid sentence, clause, section part thereof, not been included herein.

SECTION XII

AMENDMENTS:

This ordinance may be amended as provided by vote of the Town Council.

SECTION XIII

EFFECTIVE DATE:

This ordinance shall become effective April 3, 1992 and immediately upon becoming effective the Town's current Flow Control Ordinance shall be repealed.

Adopted by the Gray Town Council on March 3, 1992 and amended on June 2, 1992.

A True Copy

Attest: /s/ Paul Bird
PAUL BIRD
Town Clerk

September 28, 1992

APPENDIX F

§ 1304-B. Delivery of solid wastes to specific waste facilities

1. Findings and purpose. The Legislature makes the following findings of fact. Subject to the provisions of chapter 24 [1], the State requires each municipality to provide for disposal services for domestic and commercial solid waste generated within the municipality. Solid waste contains valuable recoverable resources, including energy. Many municipalities have found that energy recovery reduces the cost of solid waste disposal. Energy recovery technology is complex and the equipment requires a steady supply of waste to operate efficiently. Because of the complicated technology, most energy recovery facilities have high capital costs and long payback periods. In order to remain cost effective throughout their lives, these energy recovery facilities require a guaranteed, steady supply of waste. Consequently, municipalities utilizing energy recovery facilities are usually required to enter long-term agreements to provide the facilities with specific amounts of waste. In order to make these energy recovery facilities financially feasible, and thereby simultaneously improve the environmental impacts and the economics of municipal solid waste disposal, municipalities shall have the legal authority to control the handling of solid waste generated within their borders.

The purpose of this section is to promote the recovery of resources from solid waste by creating one of the conditions which make energy recovery economically feasible, assuring municipalities the authority to guarantee a steady supply of solid waste to specific waste facilities.

2. Flow control. Subject to the provisions of chapter 24 [1], municipalities are expressly authorized to enact ordinances that control solid waste collection, its transportation or its delivery to a specific facility, when the purpose and effect of such an ordinance is to gain manage-

ment montrol over solid waste and enable the reclamation of resources, including energy, from these wastes. This authorization includes, but is not limited to, ordinances:

A. Requiring segregation of wastes;

B. Requiring delivery of wastes generated within the municipality, or any portion of those wastes, to a designated disposal or reclamation facility;

C. Designating certain materials as recyclable and exempt from the provisions of paragraph B; and

D. Designating yard wastes as compost material and requiring delivery of these wastes to a designated composting facility.

3. Repealed. Laws 1989, c. 585, § 14.

4. Contracts. In order to encourage and facilitate the financing and development of solid waste facilities, including, but not limited to, facilities for resource recovery, municipalities shall have the following powers, notwithstanding any law, charter, ordinance provision or limitation to the contrary:

A. To contract with a corporation described in subsection 5 or a refuse disposal district organized under chapter 17 [1] or any person, including, but not limited to, the owner or operator of any waste facility, for the collection, transportation, storage, processing, salvaging or disposal of waste. Any such contract may be for such term of years and may contain such other provisions as the municipality may approve. Any such contract may provide that, in consideration for the obligation of the facility owner or operator to handle all or any portion of the solid waste generated in the municipality, the municipality shall pay to the facility owner or operator such fees, assessments and other payments as shall be established in accordance with the contract.

B. Without limiting the generality of the powers conferred in paragraph A, to agree in such a contract to pay fees, assessments or other payments in such amounts as may be reasonably necessary to pay:

(1) Costs associated with financing, developing, constructing, repairing, maintaining and operating all or any one or more of the waste facilities owned or operated by the facility owner or operator, including, but not limited to, the payment of debt service and the maintenance of reasonable reserves or sinking funds in connection with the financing or operation of any such waste facilities;

(2) Any other costs incurred by the facility owner or operator in connection with the handling of solid waste, whether performed at any waste facility referred to in subparagraph (1) or at another such facility differently owned and operated; and

(3) Any deficiencies arising by virtue of the failure of any other municipality so agreeing to meet its obligations to pay the costs set forth in subparagraphs (1) and (2) in accordance with any similar agreement with the same facility owner; and

C. To pledge the full faith and credit of the municipality for the payment of fees, assessments and other payments, as provided in paragraphs A and B, and to levy upon and raise from taxable estates within the municipality by general taxes the amounts required to pay these fees, assessments and payments or to raise those amounts by means of any fee, user charge or other cost-sharing or assessment mechanism duly adopted and authorized by the municipality or to borrow those amounts by issuance of general obligation bonds or notes.

Any contract complying with the requirements of this subsection and subsection 6 shall be a properly authorized, legal, valid, binding and enforceable obligation of the municipality, regardless of whether the agreement was authorized, executed or delivered prior to or after the effective date of this subsection.

4-A. Contract limitations. Any contract, including any contract in existence on the effective date of this subsection, for the provision of waste disposal, transportation or handling services to municipalities is subject to the following limitations.

A. No contract for waste disposal, transportation or handling services may prevent a municipality from recyling any portion of its solid waste, provided that any minimum BTU content level and minimum tonnage level required by that contract is maintained by the municipality.

B. No contract for waste disposal, transportation or handling services may prevent a municipality from meeting its obligations to supply a minimum BTU content level and minimum tonnage level required by that contract using solid waste generated outside its borders, provided that:

(1) The municipality is or will be unable, as the direct result of recycling or source reduction efforts, to meet the obligations using solid waste generated within its jurisdiction; and

(2) The municipality is liable for any damages caused by any solid waste it relies upon to satisfy the provisions of its contract.

C. For those waste disposal, transportation or handling services contracts which do not principally rely upon requiring minimum BTU content level or minimum tonnage level to secure solid waste for the waste disposal facility, but which instead rely upon

a requirement that the municipality provide all or most of its solid waste to the waste disposal facility, no such contract may prohibit a municipality during the term of the contract from recycling those materials which the municipality determines to be recyclable.

D. A municipality which anticipates that it will be unable to meet its contract obligation to supply a minimum BTU content level or minimum tonnage due to waste reduction or recycling programs and is unable to reach an agreement with the incinerator for the anticipated reduction may request the agency to intercede. The agency shall assist the incinerator in soliciting solid waste to mitigate any anticipated shortfall in minimum BTU content level or minimum tonnage. If no agreement on mitigation of an anticipated shortfall is reached, the terms of the original contract shall prevail, except as otherwise provided in this chapter.

5. *Public waste disposal corporations.* Notwithstanding any law, charter, ordinance provision or limitation to the contrary, pursuant to any interlocal agreement entered into in accordance with Title 30-A, chapter 115,[2] any 2 or more municipalities may organize or cause to be organized or may participate in one or more corporations organized as nonprofit corporations under Title 13, chapter 81,[3] or Title 13-B for the purpose, among other permissible purposes, of owning or operating any one or more waste facilities described in subsection 4, paragraph A, and a subscribing municipality may agree in any such interlocal agreement to pay fees, assessments or other payments as described in subsection 4, paragraph B, for such term of years and on such other terms as the interlocal agreement may provide and may pledge the full faith and credit of the municipality to the same extent provided in subsection 4, paragraph C. The applicable interlocal agreement or the articles of incorporation or bylaws of the corporation must provide that:

A. The corporation shall be organized and continuously thereafter operated as a nonprofit corporation, no part of the net earnings of which may inure to the benefit of any member, director, officer or other private person;

B. The directors of the corporation shall be elected by the municipal officers of the municipalities participating in the corporation; and

C. Upon dissolution or liquidation of the corporation, title to all of its property shall vest in one or more of the municipalities participating in the corporation.

Any interlocal agreement complying with the requirements of this subsection and subsection 6 must be a properly authorized, legal, valid, binding and enforceable obligation of the municipality, regardless of whether the agreement was authorized, executed or delivered prior to or after the effective date of this subsection. Any corporation organized in a manner that satisfies the requirements set forth in this subsection and subsection 6, whether organized prior to or after the effective date of this subsection, shall be deemed for all purposes as organized pursuant to this subsection. If so provided in the applicable interlocal agreement, any such corporation shall have the power, in addition to any other powers that may be delegated under Title 30-A, chapter 115, to issue, on behalf of one or more of the municipalities participating in the corporation, in order to finance the facilities, revenue obligation securities issued in accordance with Title 10, chapter 110, subchapter IV,[4] and any other bonds, notes or debt obligations which municipalities are authorized to issue by applicable law. For these purposes, the term "municipal officers" as used in Title 10, chapter 110, subchapter IV, means the board of directors of any corporation described in this subsection. Title 10, section 1064, subsection 6, may not be construed to prohibit the assignment or pledge as collateral security of any

contract of a municipality authorized by this section or of any or all of the payments under this section, regardless of whether the provisions of subsection 4, paragraph C, are applicable to the contract or payments. The provisions of Title 10, sections 1063 and 1064, subsection 1, paragraph A and paragraph C, subparagraph (4) do not apply to revenue obligation securities issued by any public waste disposal corporation described in this subsection.

6. Relationship to other laws. The obligation of a municipality to pay any fees, assessments or other payments in accordance with any agreement entered into pursuant to subsection 4 or any interlocal agreement referred to in subsection 5 shall not constitute a "debt" or "indebtedness" of the municipality within the meaning of any statutory, charter or ordinance provision limiting the incurrence or the amount of municipal indebtedness nor shall the authorization or incurrence of the obligation or any municipal action to raise funds to meet the obligation by any means set forth in subsection 4, paragraph C, require or be subject to any voter referendum or approval under any law or any charter or ordinance provision.

A. A municipality may agree to make payments in accordance with subsection 4, paragraph B, or in accordance with the provisions of any interlocal agreement referred to in subsection 5 with regard to all or any portion of debt incurred or to be incurred for the financing of one or more waste facilities, provided that no such payments shall be made with respect to debt or any portion of debt which, when incurred, would cause the total principal balance of all then outstanding debt or portions of debt to which the payments apply to exceed:

(1) Three percent of the last full state valuation of the municipality; minus

(2) The municipality's then obtaining allocable share of any debt or portions of debt described

in paragraph B with regard to which it is obliged to make payments.

B. Notwithstanding paragraph A, 2 or more municipalities may agree to make payments in accordance with subsection 4, paragraph B, or in accordance with any interlocal agreement referred to in subsection 5 with regard to all or any portion of debt incurred or to be incurred for the financing of one or more waste facilities, provided that no such payments may be made with respect to debt or any portions of debts which, when incurred, would cause the total principal balance of all then outstanding debt or portions of debt to which the payments apply to exceed:

(1) Three percent of the sum of the last full state valuation of all municipalities so agreeing; minus

(2) Any amounts of debt or portions of debt described in paragraph A in connection with which any such municipality is obliged to make payments.

The limitations set forth in paragraphs A and B shall only apply to agreements by which a municipality or group of municipalities have agreed to make payments directly based, among other things, on a facility owner's costs of debt service and other costs of financing and shall not be construed to apply to contract payments calculated on any other basis, even if the facility owner uses the payments to meet its debt service obligations.

The obligation of the municipality to pay fees, assessments and other payments in accordance with subsection 4 or any interlocal agreement referred to in subsection 5 shall be binding upon and enforceable against the municipality without regard to whether all or any one or more of the waste facilities referred to in subsection 4, paragraph B, subparagraph (1), becomes operational or was

or will be in operation during the period for which the fees, assessments or other payments are so charged.

No contract entered into in accordance with subsection 4 nor any ordinance adopted under the authority of subsection 2 may be deemed a contract in restraint of trade or otherwise unlawful under Title 10, chapter 201.[5]

Notwithstanding any law, charter or ordinance provisions to the contrary, the powers conferred upon a municipality pursuant to subsections 4 and 5 and this subsection may be exercised by the municipal officers as defined in Title 30-A, section 2001, including the assessors of a plantation, only when authorized, in the case of a municipality with a city or town council, by action of the council and, in the case of a municipality without such a council, by action of the town meeting. This paragraph shall apply whether or not the action of the city council, town council or town meeting was taken before or after March 21, 1986.

Nothing in this section may be construed to be a limitation on the Home Rule powers granted to municipalities under Title 30-A, section 3001, or on the ability of communities to jointly exercise their powers as is recognized in Title 30-A, section 2201. This section provides an additional and alternative method for carrying out this subchapter.

7. Subjugation. Notwithstanding any provision of this section to the contrary, the exercise of any power or authority granted under this section is subject to the provisions of chapter 24.[1]

APPENDIX G

ONE HUNDRED AND SIXTH LEGISLATURE

Legislative Document No. 1903

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED SEVENTY-THREE

AN ACT Relating to Solid Waste Disposal

Be it enacted by the People of the State of Maine, as follows:

R. S., T. 38, c. 13, additional. Title 38 of the Revised Statutes is amended by adding a new chapter 13, to read as follows:

CHAPTER 13
SOLID WASTE MANAGEMENT

§ 1301. Short title

This chapter shall be known and may be cited as the "Maine Solid Waste Management Act."

§ 1302. Declaration of policy

The Legislature declares it to be the policy of the State of Maine consistent with its responsibility to protect the health, safety and welfare of its citizens, enhance and maintain the quality of the environment, conserve natural resources and prevent water and air pollution, that it shall encourage solid waste programs, public or private, which will reduce the volume of solid waste production, improve efforts to reuse and recover valuable resources currently being wasted and which will not adversely affect the public health, safety and welfare of the citizens nor degrade the environment.

The Legislature also finds and declares that economic, efficient and environmentally sound method of waste disposal is of the highest priority. Municipalities are generating increasing amounts of solid waste with no systematic or consistent methods being used to reduce the volume of waste or to soundly dispose of it. Failure to plan properly for future solid waste may further deplete already taxed natural resources and aggravate environmental and public health problems resulting from present inadequate practices of resource recovery and solid waste disposal.

§ 1303. Definitions

The following words when used in this chapter shall have the following meanings unless the context in which they are used clearly shows a different meaning:

1. Board. "Board" means the Board of Environmental Protection.

2. Commissioner. "Commissioner" means the Commissioner of the Department of Environmental Protection.

4. Municipality. "Municipality" means a city or town.

5. Person. "Person" means an individual, firm, corporation, partnership, association, municipality, quasi-municipal corporation, state agency or any other legal entity.

6. Recoverable resources. "Recoverable resources" means materials that still have useful physical or chemical properties after serving a specific purpose and can be reused or recycled for the same or other purposes.

7. Solid waste. "Solid waste" means useless, unwanted or discarded solid material with insufficient liquid content to be free flowing, including by way of example, and not by limitation, rubbish, garbage, scrap materials,

junk, refuse, inert fill material and landscape refuse, but shall not include septic tank sludge or agricultural wastes.

8. Solid waste disposal facility. "Solid waste disposal facility" means any land area or structure or combination of land area and structures, including dumps, used for storing, salvaging, processing, reducing, incinerating or disposing of solid wastes.

9. Solid waste management. "Solid waste management" means purposeful, systematic and unified control of the collection, storage, transportation, processing, salvaging and disposal of solid waste.

§ 1304. Department; powers and duties

1. Rules and regulations. The board may adopt, amend and enforce such rules and regulations as it deems necessary governing solid waste management, including the location, establishment, construction and alteration of solid waste facilities. Such regulations shall be designed to encourage logical utilization of recoverable resources, to minimize pollution of the state's air, land and water resources, prevent the spread of disease or other health hazards, prevent contamination of drinking water supplies and protect public health and safety. In adopting such regulations, the board shall also consider economic impact, technical feasibility and such differences between municipalities as are created by population, waste volume and geographic location. Regulations shall be promulgated in the manner provided by section 361. The municipal officers of all municipalities shall be notified, in writing, at least 30 days prior to any hearing. Regulations adopted pursuant to this section shall not become effective until July 1, 1975, thereby affording ample opportunity for the Legislature to modify, expand or reject such regulations as deemed appropriate.

No regulation adopted pursuant to this section shall exceed air quality standards authorized by Title 38, chapter 4.

2. Site location. The board may provide by regulation that no person may locate, establish, construct, alter or operate any solid waste disposal facility unless approved by the board under sections 481 to 488.

3. Municipal status reports. The department shall review reports submitted by municipalities as required by section 1305. Report forms shall be prepared and distributed by the department. Required information shall include, but not be limited to, the following:

A. Location of solid waste disposal facility sites within the municipality whether publicly or privately owned or operated, their mode of operation and anticipated useful life;

B. Ordinances or regulations adopted by or proposed for the municipality which regulate the use of waste disposal facilities within the municipality;

C. All legal arrangements established by municipalities for providing a solid waste disposal facility for solid waste generated within the municipality;

D. Any plan for solid waste management officially adopted by the municipality.

4. Technical assistance. The department is authorized to establish guidelines for effective solid waste management, to provide technical assistance to persons planning, constructing or operating solid waste disposal facilities, and to conduct applied research activities in the field of solid waste management, including methods of recycling solid waste items.

5. Planning grants. The department is authorized to receive funds, public and private, to use such funds for the administration of this chapter and to make grants from such funds to municipalities and regional planning agencies or their agents as designated by the municipality, for the purpose of planning and implementing solid waste management activities and solid waste disposal facilities pursuant to guidelines established by the board.

§ 1305. Municipalities; powers and duties

1. Disposal facilities. Each municipality shall provide a solid waste disposal facility for domestic and commercial solid waste generated within the municipality and may provide such a facility for industrial wastes and sewage treatment plant sludge.

2. Ordinances. This chapter shall not be construed as limiting the authority of any municipality to enact ordinances for the regulation of solid waste disposal, provided that such ordinances are not less stringent than or inconsistent with the provisions of this chapter or the regulations adopted thereunder.

3. Contracts. Municipalities may contract with any person for the collection, transportation, storage, processing, salvaging or disposal of solid wastes.

4. Municipal status reports. The municipal officers of each municipality shall, on or before the first day of November, 1973, and on or before the first day of June each year thereafter, submit on forms prepared by the department, information relating to solid waste management within the municipality.

5. Municipal permits. All permits issued pursuant to Title 30, sections 2451 to 2460 shall, in addition to requirements imposed by those sections, be conditioned on compliance with rules and regulations adopted by the board concerning the operation of solid waste disposal facilities. Copies of permits issued by the municipality shall be submitted to the department within 30 days of issue.

§ 1306. Prohibited acts

It shall be unlawful for any person to establish, construct, alter or operate any waste disposal facility or to store, collect, transport, process or dispose of solid waste contrary to regulations promulgated by the department.

§ 1307. Violations

Any person violating any provision of this chapter or the rules or regulations promulgated thereunder shall be punished by a fine of not more than $500 for each day a violation exists. The Superior Court shall have jurisdiction to enjoin any violation of this chapter or the rules or regulations promulgated thereunder.

§ 1308. Exemptions

Rules and regulations adopted pursuant to this chapter concerning the location, establishment and construction of solid waste disposal facilities, but not concerning alteration or operation, shall not affect such facilities in existence prior to the effective date of this Act.

STATEMENT OF FACT

The purpose of this Act is to designate the Department of Environmental Protection as the State agency responsible for developing guidelines and regulations relating to the collection, storage, processing, salvaging and disposal of solid wastes. The Department would be empowered to enact uniform regulations designed to prevent environmental harm and public health hazards, however, such regulations will not become effective until July 1, 1975, thereby affording the 107th Legislature to modify, expand or reject such regulations as deemed appropriate. This Act also requires municipalities to assume responsibility for the orderly disposal of solid waste except that generated by industry and waste water treatment plant sludge.

STATE OF MAINE
SENATE
106TH LEGISLATURE

SENATE AMENDMENT "A" to H.P. 1478, L.D. 1903, Bill, "AN ACT Relating to Solid Waste Disposal."

Amend said Bill in that part designated "*§ 1308.*" by adding at the end of new sentence to read as follows:

'Landscape refuse and fill disposal sites established in connection with public works projects and commonly known as "stump dumps" are exempt from this chapter.'

Statement of Fact

The purpose of this amendment is to exempt "stump dumps" from the bill.

Name: /s/ [Illegible]
(Schulten)

County: Sagadahoc.

Reproduced and distributed pursuant to Senate Rule No. 11 A.

(2)

No. 93-1133

FILED
FEB 11 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

TOWN OF GRAY, and
REGIONAL WASTE SYSTEMS, INC.,

Petitioners,

v.

TRI-STATE RUBBISH, INC., and
RECYCLABLES UNLIMITED SERVICES, INC.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Judicial Court
Of The State Of Maine**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE PRESENTED BY THE PETITION

WHETHER THE SOLID WASTE FLOW CONTROL ORDINANCE ADOPTED BY THE TOWN OF GRAY, MAINE, IS EXEMPT FROM THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

Tri-State Rubbish, Inc. ("Tri-State") is a hauler of commercial and residential waste. Tri-State operates in the State of Maine. Tri-State commenced this action in the Superior Court of the State of Maine seeking, *inter alia*, a declaration that the Solid Waste Flow Control and Recycling Ordinance (the "Ordinance") adopted by the Town of Gray, State of Maine, violates the dormant Commerce Clause (United States Constitution, Art. I, sec. 8, cl. 3). A copy of the Ordinance is included as Appendix E to the Petition for a Writ of Certiorari (Pet. App. 47a, et seq.) submitted by the Petitioners Town of Gray and Regional Waste Systems, Inc. ("RWS").

A. Background

RWS is a non-capital stock, non-profit corporation formed by Gray and 19 other municipalities to construct and operate a waste to energy plant for the disposal of solid waste generated in the member municipalities. The construction of the RWS facility was financed primarily by the issuance of bonds totalling $105 million. See, Pet. 8. The financing was predicated upon the requirement

that each member municipality adopt a flow control ordinance assuring delivery of all solid waste generated in their respective municipality to be used as fuel to operate the waste to energy plant. See, Pet. 8, 27.

Each of the member municipalities contracted with RWS for solid waste disposal services by executing and delivering a Waste Handling Agreement. See, Pet. 8-9. The Waste Handling Agreements require Gray and each other member municipality to adopt solid waste flow control ordinances mandating delivery of all "acceptable waste" generated in the respective municipality to RWS or, with certain exceptions, pay a penalty equal to 125% of the tipping fee for each ton of "acceptable waste" which is diverted elsewhere for any reason.

Maine municipalities are authorized by the State to adopt solid waste flow control ordinances "when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes." See, 38 M.R.S.A. § 1304-B(2) (West 1989). The legislation is intended to promote the financing of disposal facilities by guaranteeing a steady supply of solid waste to such facilities. See, 38 M.R.S.A. § 1304-B(1) (West 1989).

Appendix E to the Petition is a copy of the present version of the flow control ordinance duly adopted by Gray pursuant to the Waste Handling Agreement and the enabling statute. Section III-C provides that all solid waste generated in Gray is the property of the Town. Section VII-D of the Ordinance requires that Tri-State, and all other waste haulers operating in Gray, only deliver solid waste generated in Gray to RWS for disposal

at a cost to the hauler of $51 per ton. The Ordinance requires that all segregated, recyclable waste generated by a commercial establishment may be delivered by the generator to the Gray Transfer Station without charge to the generator. See, Ordinance, Section IV-B. Commercial haulers are denied access to the Transfer Station and no provision is made in the Ordinance for the delivery of recyclable waste to any facility other than the waste to energy incinerator. See, Ordinance Sections VII-D, H.

It is Tri-State's position that solid waste is a valuable commodity regularly traded in interstate commerce as fuel for waste to energy plants and/or for recovery of reusable, recyclable materials. The Ordinance prohibits commercial haulers from collecting, processing or otherwise putting solid waste into commerce. The Petitioners have ordered an embargo of all solid waste generated in Gray. The commodities are quarantined or restrained from interstate trade for the exclusive economic benefit of Gray and RWS.

B. Proceedings Below

The proceedings in the State Courts are described accurately by Petitioners. The Supreme Court of the State of Maine, sitting as the Law Court, has considered on appeal by Tri-State the decision of the Superior Court granting summary judgment in favor of Gray and RWS. The Supreme Court reversed the decision of the Superior Court finding that the Ordinance has a discriminatory effect on interstate commerce and remanded the case to the Superior Court for further proceedings in which it will be the burden of Gray and RWS to "show valid

reasons for this Ordinance other than economic protectionism and must also show that reasonable alternatives to the Ordinance are unavailable". See, *Tri-State Rubbish, Inc. v. Town of Gray*, 632 A.2d 134, 136-137 (Me. 1993).

REASONS FOR DENYING THE PETITION OF CERTIORARI

1. The Petition for a Writ of Certiorari is premature. The Maine Supreme Court remanded the case for hearing on the question whether there are legitimate grounds for interference with interstate commerce. The evidence to be presented may be determinative of the issue and render moot the request for this Court's review of the constitutional issues.

2. The Maine Supreme Court found correctly that the Ordinance is an impermissible interference with interstate commerce because it seeks to reserve a valuable commodity from trade for the exclusive use of RWS. The Ordinance insulates RWS from competition with businesses using other waste disposal alternatives, including, without limitation, the reuse and recycling of materials which would otherwise be incinerated by RWS. Until the Town of Gray can demonstrate that the Ordinance was not adopted for economic protectionism and that there are no reasonable alternatives for the disposal of waste, there is no final judgment.

3. The Petitioners' argument that principals of federalism exempt the Town of Gray from the application of the dormant Commerce Clause was not advanced below and may not be raised at this juncture.

4. The directions contained in the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.A. § 6901, et seq., for local control of waste disposal by environmentally sound methods do not authorize local government interference with interstate commerce. A federal statute promulgated pursuant to the Commerce Clause does not create an exemption by implication from constitutional restraints.

ARGUMENT

1. The Petitioners' Request For A Writ Of Certiorari Is Premature.

The Maine Supreme Court remanded this case to the trial court for specific findings directly relevant to the constitutionality of the Ordinance. The decision of the Maine Supreme Court does not constitute a final judgment granting review by this Court pursuant to 28 U.S.C.A. § 1257(a) (West 1993). See, *O'Dell v. Espinoza*, 456 U.S. 430 (1982).

The four bases generally used as a basis for taking jurisdiction prior to final judgment are set forth in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 467 (1975). First, the remand requires an affirmative finding by the trial court if the Ordinance is to be found constitutional. Second, there is no proof of immediate hardship of an irreparable nature to Gray or RWS by requiring the Petitioners to present their proof for an exemption. Third, the findings by the trial court may eliminate any constitutional questions. Fourth, there are no unique questions of federal policy presented by this Petition because the critical

issues in this case are now being considered by this Court in *Town of Clarkstown v. C&A Carbone, Inc.*, 587 N.Y.S.2d 681 (1992), cert. granted, 126 L.Ed.2d 369, 62 U.S.L.W. 3334.

Further proceedings are necessary to determine the existence of a federal question and to frame the issue. See, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); Wright, Miller, Cooper & Greshman, *Federal Practice & Procedure, Civil* § 4009 at 589-590 (2 Ed. 1990 and Supp. 1993). This case is not ready for review by this Court.

2. The Ordinance Is Discriminatory On Its Face And Is Subject To Review In The Trial Court By A "Strict Scrutiny" Standard.

The trial court made a finding that the Ordinance has an effect on interstate commerce (Pet. 38a). The trial court stated, " . . . yes, it restricts the free flow of commerce, taking the view, as you have, correctly, that waste is a commodity." See, Pet. 38a. The Maine Supreme Court agreed that waste is a commodity, citing *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 112 S.Ct. 2019, 2033 (1992). Specifically, the Maine Supreme Court found that:

> The aggregate effect of ordinances similar to Gray's could have a substantial impact on interstate commerce. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 537 (1985); *Hodel v. Virginia Surface Mining and Reclamation Ass'n. Inc.*, 452 U.S. 264, 277 (1981).
>
> (Pet. 4a)

The statement by Petitioners is disingenuous. The findings by the trial court completely describe the nature of the intrusion upon interstate commerce and concede that the Ordinance is facially discriminatory. The Maine Supreme Court, therefore, affirmed the findings of fact by the trial court.

At page 23 of their Petition, Gray and RWS charge that the Maine Supreme Court "did not discuss how such discrimination manifests itself . . . "

The concept that even-handed regulation of intra-municipal activities is irrelevant. The Petitioners fail to recognize the intra-municipal and interstate impact of the Ordinance. Preclusion of waste from interstate and, indeed, from intra-municipal commerce, injures others who have need of the commodity to fuel other waste to energy plants as well as for recycling and other more desirable forms of waste disposal identified by the Maine Legislature at 38 M.R.S.A. § 2101 (West Supp. 1993).

The argument that intra-municipality even-handedness does not violate the dormant Commerce Clause is the same position advanced by the Town of Clarkstown, see, pp. 14-15 of the Town of Clarkstown's Reply to the Petition of C. A. Carbone, Inc. This argument was put to rest in *Fort Gratiot*, supra, 112 S.Ct. at 2023. Entire industries are dependent on the supply of waste. Hoarding necessarily restricts the flow of waste to others requiring waste for raw material in their business activities.

3. Petitioners Did Not Raise The Issue Of Federal Delegation In The Maine Courts.

The Petitioners contend that RCRA § 6901(a)(4) (West 1983) constitutes an express reservation to the state and local governments of the authority to restrict interstate trade in connection with the disposal of solid waste. This issue was not raised by the Petitioners either in the trial court or on appeal to the Maine Supreme Court. This issue was not specially set up or claimed in the State courts as required by 28 U.S.C.A. § 1257 (West 1993). There is an inadequate record in the State courts to fully present the issue regarding federal delegation of powers. The standards outlined by this Court in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985) have not been met.

A trial on the merits of federal pre-emption would necessarily involve an examination of the congressional intent to displace interstate commerce to meet objectives that can readily be achieved by less obtrusive means. Evidence can show that other activities to avoid landfilling are more consistent with the objectives of the RCRA. For example, the residual ash from incineration is equal to about 30% of the original weight. This ash is often toxic. The ash is dumped in a landfill. Also, the process of incineration creates air pollution sought to be limited by other federal and state laws.

If the issue of the pre-emption of the dormant Commerce Clause had been raised in the State courts, there would have been extensive dialogue regarding conflicting policy goals.

Therefore, the Petitioner's federal pre-emption argument cannot be raised for the first time in this request for Certiorari.

It has been the position of this Court that a *de novo* review will not be entertained on appeal from the state courts. See, *Cadinale v. State of Louisiana*, 394 U.S. 437, 439 (1969). It is the burden of the Petitioners to show that this particular issue has been preserved for consideration by this Court, and the Petitioners have made no effort to comply with this requirement.

4. RCRA Does Not Restrict The Application Of The Dormant Commerce Clause To Validate Hoarding Of Commodities.

Without any precedential authority, the Petitioners claim that RCRA "implicitly" grants municipalities the authority to control waste because RCRA describes waste disposal as a purely local authority. The Petitioners then say that waste disposal is impossible without flow control. The Petitioners equate the ability to enter into disposal contracts with a congressional exemption from the dormant Commerce Clause.

The argument that waste facilities could not be financed without an assurance of a steady supply of waste was advanced in *DeVito v. Rhode Island Solid Waste Management Corporation*, 770 F.Supp. 775, 784 (D.R.I. 1991). The District Court rejected this theory indicating that lenders should be satisfied with a pledge of the full faith and credit of the municipalities.

No argument is advanced here, nor was it advanced in the Maine courts, tying the primary duty to dispose of waste to an exemption from constitutional limitations. Nothing in the RCRA leads to the conclusion that Congress intended to suppress free trade in waste and to encourage balkanization of waste disposal. Without specific authorization, the Commerce Clause must prevail. See, *Quill Corp. v. North Dakota*, 112 S.Ct. 1904, 1913 (1992).

CONCLUSION

The Maine Supreme Court correctly decided the issues in this case, and those issues are now under consideration by this Court in *Clarkstown*. There is no reason to grant Certiorari in this case, and even if there were, the request for certiorari is premature.

Respectfully submitted, this 11th day of February, 1994.

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Supreme Court, U.S.
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No. 93-1133

In the
Supreme Court of the United States

October Term, 1994

TOWN OF GRAY, and
REGIONAL WASTE SYSTEMS, INC.,
Petitioners,

v.

TRI-STATE RUBBISH, INC., and
RECYCLABLES UNLIMITED SERVICES, INC.,
Respondents.

Petition For A Writ Of *Certiorari*
To The Maine Supreme Judicial Court

BRIEF FOR THE STATE OF MAINE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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STATEMENT OF INTEREST

The State of Maine (the "State") submits this brief by its Attorney General as *amicus curiae*, pursuant to Supreme Court Rule 37.5, in support of the pending petition for a writ of *certiorari*. In the State's view, the decision of the Supreme Judicial Court of Maine incorrectly concluded that a local police power ordinance regulating solely its own local municipal solid waste has a "discriminatory effect" on interstate commerce, thereby arguably subjecting the ordinance to strict scrutiny at trial under the Commerce Clause.

The State files this brief because it has a vital interest in the responsible management of municipal solid waste generated within its borders, where local ordinances of the kind at issue here play a major role. Maine municipalities have historically been both required by the

State to dispose of locally generated waste and permitted to direct such waste to a particular waste disposal facility. In recent years, however, the State has required literally hundreds of local, substandard landfills to be closed, and has provided financial support to municipalities leading to the development of environmentally superior regional waste disposal solutions, such as the waste-to-energy (incineration) facility owned by Petitioner Regional Waste Systems, Inc. ("RWS"). Historically both the executive and legislative branch of State government have assumed responsibilities in this State and local partnership.

Reinforcing this new approach, in 1989 the Legislature created a new agency, the Maine Waste Management Agency, to plan for and implement an integrated approach to solid waste management.

38 M.R.S.A. §§ 2101, *et seq.* (Supp. 1993). That Agency is specifically charged to work with municipalities and regional associations to manage the State's solid waste. 38 M.R.S.A. § 2103(2)(J) (Supp. 1993). If the error in the decision below is not corrected, and the ordinance is ultimately determined to be unconstitutional, the State's policy of encouraging regional waste management solutions will be frustrated. Consequently, Petitioner Town of Gray and many other municipalities will undoubtedly turn to the State for financial and/or other support in the wake of the instability created, or may alternatively abandon all efforts to responsibly manage waste disposal practices within their jurisdiction. Either way the State will be directly and adversely impacted. Accordingly, the State has a strong

interest in presenting its views on the constitutionality of the Town of Gray Ordinance.[1]

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[1] The State presented its position in an *amicus* brief in a similar case before the Supreme Judicial Court of Maine, *City of Auburn and Mid-Maine Waste Action Corporation v. Tri-State Rubbish, Inc.*, 630 A.2d 227 (Me. 1993). In that brief (as here) the State took the position that the [Auburn] solid waste flow control ordinance was authorized by State law, did not discriminate against interstate commerce, and thus Auburn needed only to show that any incidental burden on interstate commerce resulting from the Ordinance was not clearly excessive in relation to local benefits, in order to survive Commerce Clause scrutiny. In spite of Tri-State's focus on both waste and recyclables in its arguments, the holding of the Supreme Judicial Court in the *City of Auburn* case (with respect to the Commerce Clause) was limited to the Ordinance's impact on recyclable materials. 630 A.2d at 234. The Court's decision did not reach the waste issue, and remanded the case to permit Tri-State "to demonstrate more specifically the recycling markets effected." *Id.* at note 19. The *City of Auburn* case is still pending in Superior Court.

Since the State had already presented its position in the *City of Auburn* case, it did not file an *amicus* brief in this later case.

ARGUMENT

THE CONSTITUTIONALITY OF LOCAL POLICE POWER ORDINANCES THAT DIRECT TOWN GENERATED MUNICIPAL SOLID WASTE TO DESIGNATED WASTE-TO-ENERGY FACILITIES IS AN ISSUE OF TREMENDOUS PRACTICAL IMPORTANCE TO THE STATE OF MAINE

The State of Maine is aware that there is now pending before this Court a case in which a local police power ordinance directing local waste (that originated out-of-state) to a local transfer station has been challenged as violative of the Commerce Clause of the U.S. Constitution. In *C & A Carbone v. Town of Clarkstown*, No. 92-1402 (U.S. Sup.Ct. argued Dec. 7, 1983), multiple briefs in support of *Clarkstown* have ably presented the principal Commerce Clause arguments. Indeed Maine itself joined the *amicus* brief submitted by the State of Ohio in that case. The *certiorari* petition here

both sets out a new argument concerning principles of federalism and democratic self-governance (Pet. 15-18) and distinguishes the facts here from those in *Clarkstown* (Pet. 27). The State does not intend to repeat those arguments. The State's purpose in filing this *amicus* brief is to explain to the Court the importance of the issue (a different issue from that posed in *Clarkstown)* to the State of Maine.

A. Responsible Management of Local Waste, Including Closure Of Substandard Landfills And Regionalization Of Disposal, Has Been A Long-Term State Interest.

For more than a decade the State has actively participated in helping its municipalities (and other units of local government) responsibly manage waste generated within the State. A summary of the development of the governing statutes

is set out in the *certiorari* petition. (Pet. 7-10).

The early history of State involvement in local waste management is contained in a March, 1981 report of the Maine Department of Environmental Protection (DEP), entitled *A Review of Maine's Municipal Solid Waste Management Program.* (DEP Report).[2] To summarize the report, since the mid-1960's, the disposal of solid waste was generally recognized in Maine (as well as nationally) as an important environmental issue. In 1968 the Health Engineering Division of the Maine Department of Health and Welfare was assigned responsibility for investigating solid waste management in Maine. The Division issued a report in 1970 detailing

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[2] This report is found in the Maine Law and Legislative Reference Library, State House Station 43, Augusta, ME 04333, cat. no. TD 788.4.M2 M347 1980.

the severity of the problem and suggesting possible approaches to remedying the situation. In 1973 the Legislature adopted the Solid Waste Management Act, P.L. 1983, c. 387, enacting 38 M.R.S.A. §§ 1301-1308. Pursuant to this Act, the Board of Environmental Protection adopted regulations that ultimately became effective on February 1, 1976.

The Act identified as the State's highest priority policy objective "economic, efficient and environmentally sound method[s] of waste disposal." 38 M.R.S.A. § 1302 (1973). Other policy objectives identified included the reduction of the volume of solid waste, and the reuse and recovery of resources being wasted. *Id.*

The DEP program addressed some of these policies through the following specific goals:

1. Reduction in the total number of sites;
2. Reduction of the volume of solid waste subject to land disposal; and
3. Regionalization of the disposal of solid waste.

DEP Report, pp. 1 and 8. The DEP Report documents that from 1977 to 1980 these goals were being pursued by the State and by municipalities. The number of solid waste disposal facilities decreased from 454 to 334. More than half of Maine municipalities were involved with one or more other communities in dealing with solid waste disposal. Maine communities were increasingly pursuing waste volume reduction through baling, shredding, incineration, recycling and composting.

In 1979 the Legislature established a new Solid Waste Management Subsidy Program and appropriated $500,000 to be divided among eligible communities to pay for up to 50% of their costs of maintaining and operating solid waste disposal facilities (that were in substantial compliance with State laws and regulations). 38 M.R.S.A. §§ 1311-1315 (repealed 1983).[3] In creating this program the Legislature specifically found:

> that proper disposal of solid wastes, and protection of land, air and water resources is important to the public health, safety and welfare; that the Legislature has mandated that municipalities provide for the proper disposal of solid wastes; that waste disposal facilities

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3 A copy of this statute is provided as Appendix A. The entire statute was repealed in 1983 by P.L. 1983, c. 566 § 43. In its place the Legislature enacted a $1,500,000 bond issue focused on compensating municipalities for capital costs associated with new resource recovery facilities, rather than with operating costs at existing landfills. See text, *infra*.

> must comply with strict state and federal requirements; and that the operating costs of these facilities are high, putting an increasing burden on local property taxes.

38 M.R.S.A. § 1311. The DEP Report noted that this subsidy program had two purposes: (1) to help defray costs, and (2) to provide an incentive to communities to dispose of wastes in compliance with State laws and regulations. DEP Report, p. 4. During the spring and summer of 1980, the State's program reimbursed 119 municipalities (and one recycling center) between 12 and 13 percent of eligible reported costs. *Id.* However, the DEP identified several shortcomings to the program:

1. The lower than expected rate of return to communities;

2. The probability that as more municipalities qualified, the subsidy rate would decrease; and
3. The greater than expected administrative burden on the DEP.

DEP Report, p. 5. In addition, and of more importance, the DEP perceived that this program could not be instrumental in reducing the total number of disposal sites, a goal of Maine's solid waste management program. *Id.* Shifts to alternative (superior) methods of disposal needed capital which was not available through the subsidy program. *Id.*

In 1980, DEP inspections revealed that while operation of facilities was improving, many facilities were not located in environmentally acceptable sites. DEP Report, p. 8. A four year DEP study completed in 1980 had conclusively shown that a disposal facility located on

an environmentally unacceptable site will cause adverse environmental impacts even if operated properly. DEP Report, p. 25.[4] The DEP concluded that "[t]he biggest challenge facing Maine in relation to the management of solid waste disposal is the closing and relocation of facilities which are not properly located" and noted that "the opportunity to make major improvements in this situation will present itself over the next five years as nearly two-thirds of the State's disposal [facilities] reach capacity." DEP Report, p. 8.

Against this background the State next channeled money for waste management to

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[4] The study examined the impact of Maine's solid waste disposal sites on ground water, surface water, and vegetation. Data was collected at 13 sites chosen as being representative of disposal areas located in the major surficial geologic settings in the State. DEP Report, p. 25.

municipalities through a general fund bond issue. In 1981 a bond issue in the amount of $1,500,000, was authorized by the Legislature to "provide for the evaluation and implementation of municipal or quasi-municipal solid waste resource recovery or resource conservation."[5] The preamble to the bill enacting the bond issue declared that the Legislature deemed the bonds "necessary to alleviate the threat to ground and surface waters to prevent environmental damage, to conserve valuable land and other resources and to reduce the hazard to the health, safety and welfare of the State caused by prevailing solid

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[5] The original bill proposed up to $5,000,000. Legislative Document 949 (110th Legis. 1981). A new draft of the bill revised that amount to up to $2,500,000. Legislative Document 1641 (110th Legis. 1981)(App. B to this brief). The final amount approved and ratified through a statewide referendum was $1,500,000. Sen. Amend. B to Legislative Document 1641, No. S-371 (110th Legis. 1981).

waste management practices." *Id.* (App. B) The Statement of Fact accompanying the bill further elucidated the Legislature's intent and concerns:

> The bond issue is intended to assist communities with the costs of evaluating, designing and implementing solid waste management programs which provide for resource conservation and recovery systems.
>
> Solid waste systems that protect the public health, safety or welfare and prevent or abate air and water pollution benefit the people of Maine as a whole, as well as the people of the immediate local area. Resource recovery and conservation could provide solid waste management solutions for 60% of Maine's municipal waste and reduce petroleum needs by 600,000 barrels each year. Many resource recovery projects fail to reach construction even though they are proven to be financially and environmentally advantageous. It is often impossible for communities to receive the expert management, financial and technical guidance essential for the implementation of the facility. The statewide sharing of the benefits of

> recovery and conservation programs makes it desirable that these programs be helped in obtaining the necessary professional assistance. The bond issue and its accompanying program authorization proposes that some of the development costs be shared on a statewide basis.

Legislative Document 1641, Statement of Fact (110th Legis.).

From 1982 to 1985, $1,000,000 derived from the bond issue was distributed to 13 different regions of the State. *Report of the Energy and Natural Resources Committee on Study of Solid Waste Management and Disposal Policy in Maine 25 (June 18, 1987).*[6] One recipient was the Greater Portland Council of Governments which together with Petitioner RWS prepared a feasibility study of solid waste disposal

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[6] This report is found in the Maine Law and Legislative Reference Library, State House Station 43, Augusta, ME 04333, cat. no. TD 788.4.M2 M3561 1987.

alternatives, including waste-to-energy systems. See Pet. 8, n. 5.

Some of the feasibility studies, including the one done by the Greater Portland Council of Governments, conducted with this State financial assistance identified a new problem: the need for explicit municipal authority to guarantee delivery of solid waste to a specific facility. The Legislature quickly responded by enacting 38 M.R.S.A. § 1304-B, the enabling statute under which the Gray Ordinance at issue in this case was adopted. The Statement of Fact accompanying this legislation reaffirmed the State's commitment to fully support municipalities in creating regional solutions to the State's waste disposal problems. Legislative Document 1392, Statement of Fact (111th Legis.

1983) (App. C to this brief). In that Statement it was recognized that:

1. Groups of municipalities were actively working to develop energy recovery facilities;
2. During the next five years, 120 to 150 municipalities would have to close solid waste disposal sites that had reached capacity or were causing environmental damage;
3. Energy recovery facilities have high capital costs and long payback periods;
4. Most energy recovery facilities required participating municipalities to deliver a minimum amount of waste or pay a penalty;
5. In order to meet such contractual obligations municipalities needed to pass "flow control ordinances"; and

6. Federal Court decisions indicated that a state Legislature must "clearly articulate and affirmatively express" a policy to promote energy recovery and authorize municipalities to control their solid waste.

Id. Thus, although the State has not been a financial partner in developing energy recovery facilities, it has used incentives (and penalties for substandard facilities) to encourage regional waste-to-energy facilities such as Petitioner RWS.

In more recent years the State has assumed considerable financial and technical responsibility for landfill remediation and closure. 38 M.R.S.A. §§ 1310-C to 1310-H (1983 & Supp. 1993). Additional responsibilities have been assumed by the Maine Waste Management Agency, created in 1989. Pet.

at 9, n. 7. It is notable that this Agency also has been granted the power to "[d]irect solid wastes from one public or private waste facility to another facility when an emergency is determined to exist by rule or by the Governor." 38 M.R.S.A. § 2103(1)(K) (Supp. 1993). This power has not been used.

As this review of State policy over the last quarter century demonstrates, State government in Maine has been continuously involved in local management of locally generated waste. This involvement has led to a policy of encouraging regional solutions to the waste problem, including waste-to-energy facilities. Local ordinances controlling the flow of locally generated waste are an essential element of this policy. Thus, the State has a strong interest in preserving the constitutionality of such ordinances.

B. This Court's Decision In *C & A Carbone v. Town of Clarkstown* May Not Resolve The Issue Presented Here And Thus May Create Uncertainty For Future Municipal And State Management Of Municipal Solid Waste.

It is likely that the Court's decision in *C & A Carbone v. Town of Clarkstown* will not reach the issue presented here. At oral argument on December 7, 1993, counsel for Petitioner *Carbone* clearly conceded that *Carbone's* challenge to the *Clarkstown* ordinance was only with respect to waste generated out-of-state, and not with respect to local waste. Unless the Court reaches out to decide the local waste issue, *Clarkstown* will not provide any guidance for the many communities in Maine, like the town of Gray, that have flow control ordinances governing local waste. Each such town may be subject to litigation challenging its ordinance as in violation of the Commerce Clause.

Litigation is always costly, but challenges under the Commerce Clause now present the additional risk of incurring damages and the challenger's attorney fees under 42 U.S.C.A. §§ 1983 and 1988 (1981 and Supp. 1993). See *Dennis v. Higgins*, 498 U.S. 439 (1991). Local governments are unlikely to be willing and able to marshall the resources necessary to engage in such potentially protracted and expensive litigation.

The uncertainties involved are further compounded by the fact that it is unclear under the current state of federal case law what is sufficient to meet the test required by the decision below. See Pet. 25-26.

This Court has appropriately struck down under the Commerce Clause a range of state and local attempts to keep out-of-state waste from entering into those state and

local jurisdictions. *Chemical Waste Management, Inc. v. Alabama*, 504 U.S. ___, 112 S.Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Department of Natural Resources*, 504 U.S. ____, 112 S.Ct. 2019 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). This is the first case to address a waste designation law involving solely waste generated within the governmental unit enacting the law. The standard imposed by the Court below on the Petitioners is erroneous. This error will impact not only Petitioners, but also other Maine municipalities as well as future state and local waste management policies. In addition, if uncorrected, the error carries broader implications for waste management policy in other states. This Court should grant the petition for writ

of *certiorari* in order to correct this error.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

February 11, 1994 Respectfully submitted,

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APPENDIX A

Title 38

SUBCHAPTER II

(Enacted. Laws 1979, c. 511 § 2.)

(Amended. Laws 1979, c. 640 § 3.)

(Repealed. Laws 1983, c. 566 § 43.)

§ 1311. Findings; intent

The Legislature finds that proper disposal of solid wastes, and protection of land, air and water resources is important to the public health, safety and welfare; that the Legislature has mandated that municipalities provide for the proper disposal of solid wastes; that waste disposal facilities must comply with strict state and federal requirements; and that the operating costs of these facilities are high, putting an increasing burden on local property taxes.

It is the intent of this chapter that the State will participate with

municipalities in up to 50% of the cost of maintaining and operating solid waste disposal facilities that are in substantial compliance with the requirements of this chapter.

The Legislature further intends that the State will participate with counties in up to 50% of the cost of maintaining and operating solid waste disposal facilities that are in substantial compliance with this chapter and that are assisting municipalities with the proper disposal resource recovery or transfer of solid waste.

§ 1312. Solid waste subsidy

1. Establishment. There is established a fund to provide an annual solid waste subsidy to be paid to qualifying municipalities and counties.

2. Calculation. This subsidy shall provide a percentage, up to 50% of the

actual eligible cost of solid waste facility operation and maintenance for the prior year. This percentage of state participation shall be calculated by dividing the legislative appropriation for this fund by the sum of the reported eligible costs from all municipalities and counties. Each municipality and county shall receive a subsidy equal to this percentage multiplied by their actual eligible costs for the prior year.

§ 1313. Eligible facilities

1. Facilities. All municipalities and counties operating or contracting with the following types of solid waste disposal facilities will be eligible for the solid waste subsidy:

A. Municipal facilities;

B. Private facilities;

C. County facilities; and

D. Facilities operated by regional refuse districts and other public or quasi-public entities.

2. Compliance. Those facilities that the Board has determined are in substantial compliance with the following criteria will be eligible for the solid waste subsidy:

A. Operational criteria in rules adopted under section 1304, subsection 1, for facilities established on or before October 3, 1973; and

B. Site and operational criteria in section 421 and rules adopted under section 1304 for facilities established after October 3, 1973.

3. Appeals. Municipalities and counties may appeal determination of compliance in accordance with provisions of chapter 2.

§ 1314. Eligible costs

The following costs of operating and maintaining solid waste disposal facilities will be eligible for subsidy:

1. Salaries and wages. Salaries and wages of persons for time actually employed at the facilities;

2. Utilities. Cost of all utilities used at facilities;

3. Road maintenance. Road maintenance for roads used exclusively for the facility;

4. Miscellaneous supplies and services. Miscellaneous supplies and services, including pest control, used at the facility;

5. Cover material. Cover material:

A. Cost of purchased cover material; or

B. Value of cover material based on rates to be determined by the department;

6. Equipment costs. Equipment costs:

A. Cost of rental of equipment used at the facility; or

B. Operation, maintenance and capital cost of equipment owned by the municipality or county and used at the facility. Capital costs shall be amortized over the expected life of the equipment. Only annual costs in proportion to the fraction of time the equipment is used at the facility shall be eligible for reimbursement;

7. Transfer stations. All annual costs, including equipment and transportation, resulting from operation of waste transfer stations;

8. Resource recovery. All annual costs resulting from recycling, resource recovery and energy production from solid wastes; and

9. Exclusions. Costs for transport, storage, treatment and disposal of

municipal or industrial sludge are not eligible for subsidy.

§ 1315. Administration

1. Municipal reporting of costs. The solid waste subsidy shall be based on costs for the prior calendar year. All municipalities and counties shall report actual eligible costs to the department by February 1st.

2. Determination of subsidy. The Legislature shall by May 1st annually enact legislation appropriating a fund for this subsidy. A subsidy index shall be calculated by dividing this fund by the sum of the eligible annual costs reported by municipalities and counties for the prior calendar year. If the subsidy index is greater than 0.50, it shall be established at 0.50. All money not expended from the fund shall lapse. Each municipality and county shall receive an

amount equal to this subsidy index times the municipality's or county's reported costs.

3. Authorization of payment. The commissioner shall authorize subsidy payments to the eligible municipalities and counties. The subsidy shall be paid to each municipality and county in 2 equal installments, the first on June 1st and the 2nd on October 1st each year for the prior year's costs.

4. Audits. Each municipality and county shall maintain records and accounts sufficient to document reported costs, and these records and accounts shall be available for audit for at least 3 years.

5. Appeal. The computation of the solid waste subsidy for any municipality or county may be appealed in writing to the board by the municipal officers or county commissioners within 30 days from the date

of notification of the computed amount. The board shall review the appeal and make an adjustment if, in its judgment, an error has been made. The board's decision shall be final as to facts supported by the records of the appeal.

APPENDIX B

ONE HUNDRED AND TENTH LEGISLATURE

Legislative Document No. 1641

STATE OF MAINE

IN THE YEAR OF OUR LORD

NINETEEN HUNDRED AND EIGHTY-ONE

AN ACT to Authorize a General Fund Bond Issue in the Amount of $2,500,000 to Assist Municipalities with Resource Recovery of Solid Waste.

Preamble. Whereas, the Legislature deems it necessary to alleviate the threat to ground and surface waters to prevent environmental damage, to conserve valuable land and other resources and to reduce the hazard to the health, safety or welfare of

the State caused by prevailing solid waste management practices.

Whereas 2/3 of both Houses of the Legislature deeming it necessary in accordance with the Constitution of Maine, Article IX, Section 14, to authorize the issuance of bonds on behalf of the State to provide funds for the evaluation and implementation of municipal solid waste resource recovery systems or components thereof, and any system, program or facility for resource conservation.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 38 M.R.S.A. § 1303, sub-§§ 3-A and 10-A are enacted to read:

3-A. Final implementation of resource conservation or resource recovery. "Final implementation of resource conservation or resource recovery" means negotiating and obtaining the contracts, agreements,

financing, permits and administrative framework necessary to construct or procure a resource conservation or resource recovery facility. The Board of Environmental Protection is authorized to pay an amount not in excess of 50% of the total eligible expenses incurred by a municipality or quasi-municipal entity for the final implementation of solid waste resource conservation or resource recovery or programs determined to be feasible by the Board of Environmental Protection. Grants under this subsection can be used to cover development costs or other reasonable one-time eligible costs. In addition, grants under this subsection can be used to assist municipal and quasi-municipal recycling programs with capital and one-time equipment costs.

A. The board after public hearing shall adopt criteria for the purpose of establishing eligible costs.

B. The board may adopt, amend and repeal reasonable rules necessary for the proper administration of the grant program authorized by this subsection and subsection 10-A.

C. In the event that there is a combination of federal and state grants that exceeds the total costs of the projects eligible for State assistance under this subsection or subsection 10-A, the Board of Environmental Protection may reduce the state's share by an amount equivalent to the amount in excess of the total costs of the project.

10-A. Solid waste resource recovery or resource conservation feasibility and design evaluation. "Solid waste resource

recovery or resource conservation feasibility and design evaluation" means the detailed technical, economic, organizational, transportation, market and design analysis necessary for the implementation of successful solid waste resource conservation or resource recovery.

The Board of Environmental Protection is authorized to pay an amount not in excess of 50% of the total eligible expenses incurred by a municipality or quasi-municipal entity for feasibility and design evaluation.

Sec. 2. Authorization of bond issue to assist municipalities with solid waste management resource recovery or resource conservation systems.

1. Issue of bonds to provide for the evaluation and implementation of municipal or quasi-municipal solid waste resource

recovery or resource conservation. The Treasurer of State is authorized, under the direction of the Governor, to issue from time to time bonds in the name and behalf of the State to an amount not exceeding $2,500,000 for the purpose of raising funds to provide for the evaluation and implementation of solid waste for resource recovery systems or components thereof and any system, program or facility for resource conservation. These bonds shall be general obligations to the State and the full faith and credit of the State shall be pledged to the payment of interest and redemption of the bonds.

The bonds shall be dated, shall mature at such time or times not exceeding 20 years from their date and may be made redeemable before maturity, at the option of the Treasurer of State, at such price

or prices and under such terms and conditions as may be approved by the Governor prior to the issuance of bonds.

The Treasurer of State, with the approval of the Governor, shall determine the form of the bonds, including any interest coupons to be attached thereto and shall fix the denomination or denominations of the bonds and the place or places of payment or principal and interest, which may include any bank or trust company within or without the State.

The bonds shall be signed by the Treasurer of State and any interest coupons attached thereto shall be executed with facsimile signature of the Treasurer of State. In case any officer whose signature appears on any bonds or coupons ceases to be the officer before the delivery of the bonds, the signature or facsimile shall nevertheless be valid and

sufficient for all purposes, the same as if he had remained in office until the delivery. The bonds may be issued in coupon or registered form, or both, and may be interchangeable as the Treasurer of State may determine.

2. Records of bonds issued to be kept by State Auditor and Treasurer of State. The State Auditor shall keep an account of the bonds, showing the number and amount of each, the date of countersigning, the date when payable and the date of delivery thereof to the Treasurer of State, who shall keep an account of each bond showing the number thereof, the name of the person to whom sold, the amount received for the same, the date of sale and the date when payable.

3. Sale, how negotiated, proceeds appropriated. The Treasurer of State may negotiate the sale of the bonds by

direction of the Board of Environmental Protection with the approval of the Governor. The proceeds of the sales of the bonds, which shall be held by the Treasurer of State and paid by him upon warrants drawn by the State Controller at the order of the Board of Environmental Protection or its authorized representative, are hereby appropriated to be used solely for the purposes set forth in this Act. Any balance unexpended shall not lapse, but shall be carried forward to the same account to be used only for the purpose set forth in this Act.

4. Proceeds of bonds not available for other purposes; must be separate from other funds. The proceeds of all bonds issued under the authority of this Act, and the funds made available for interest and debt retirement thereunder shall at all times be kept distinct from all other

moneys of the State and shall not be drawn upon or be available for any other purpose.

5. Interest and debt retirement. Interest due or accruing upon any bonds issued under this Act and all sums coming due for payment of bonds at maturity shall be paid by the Treasurer of State.

6. Disbursement of bond proceeds. The proceeds of these bonds shall be expended under the direction and supervision of the Board of Environmental Protection.

7. Contingent upon ratification of bond issue. Subsections 1 to 6 and section 1 shall not become effective unless and until the electors of the State have ratified the issuance of bonds as set forth in this Act.

8. Statutory referendum procedure; submission at statewide election; effective date. This Act shall be

submitted to the legal voters of the State of Maine at a statewide election to be held on the Tuesday following the first Monday of November following passage of this Act. The city aldermen, town selectmen and plantation assessors of this State shall notify the inhabitants of their respective cities, towns and plantations to meet, in the manner prescribed by law for holding a statewide election, to vote on the acceptance or rejection of this Act by voting on the following question:

"Shall a bond issue be ratified in the amount of $2,500,000 to assist municipalities with solid waste for resource conservation and recovery systems?"

The legal voters of each city, town and plantation shall vote by ballot on this question, and shall designate their choice

by a cross or check mark placed within a corresponding square below the word "Yes" or "No." The ballots shall be received, sorted, counted and declared in open ward, town and plantation meetings and returns made to the Secretary of State in the same manner as votes for members of the Legislature. The Governor shall review the returns and, if it appears that a majority of the legal votes are in favor of the Act, the Governor shall proclaim that fact without delay, and the Act shall become effective 30 days after the date of the proclamation.

The Secretary of State shall prepare and furnish to each city, town and plantation all ballots, returns and copies of this Act necessary to carry out the purposes of this referendum.

FISCAL NOTE

There are funds in the Legislative Document 267, the Part II Budget proposal for solid waste activities, sufficient to employ the 2 people needed to administer this bond issue program. It is the intent of the Energy and Natural Resources Committee that the Appropriation Committee make the necessary adjustments in the appropriation for solid waste activities in the Part II Budget to administer the bond issue program. This adjustment will be to reduce the amount budgeted for consulting services by $100,000 for the biennium to allow redistribution of this amount for personal services, all other and capital. This adjustment within the Part II Budget request will not increase the original total amount requested.

STATEMENT OF FACT

The bond issue is intended to assist communities with the costs of evaluating, designing and implementing solid waste for resource conservation and recovery systems.

Solid waste systems that protect the public health, safety or welfare and prevent or abate air and water pollution benefit the people of Maine as a whole, as well as the people of the immediate local area. Resource recovery and conservation could provide solid waste management solutions for 60% of Maine's municipal waste and reduce petroleum needs by 600,000 barrels each year. Many resource recovery projects fail to reach construction even though they are proven to be financially and environmentally advantageous. It is often impossible for communities to receive the expert

management, financial and technical guidance essential for the implementation of the facility. The statewide sharing of the benefits of recovery and conservation programs makes it desirable that these programs be helped in obtaining the necessary professional assistance. The bond issue and its accompanying program authorization proposes that some of the development costs be shared on a statewide basis.

This new draft proposes to assist communities with the implementation of solid waste energy and material recovery facilities through a bond issue mechanism. This bond issue would provide $1,575,000 to help implement resource recovery programs and $925,000 to assist material conservation and recycling programs. This will allow communities to develop efficient energy and resource saving solid

waste systems which protect the natural environment of the State and its groundwater resources.

APPENDIX C

ONE HUNDRED AND ELEVENTH LEGISLATURE

Legislative Document No. 1392

STATE OF MAINE

IN THE YEAR OF OUR LORD

NINETEEN HUNDRED AND EIGHTY-THREE

AN ACT to Authorize Municipalities to Guarantee Delivery of Their Solid Wastes to Specific Waste Facilities

---

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 38 M.R.S.A. § 1304-B is enacted to read:

§ 1304-B. Delivery of solid wastes to specific waste facilities

1. Findings and purpose. The Legislature makes the following findings

of fact. The State requires each municipality to provide a disposal facility for domestic and commercial solid waste generated within the municipality. Solid waste contains valuable recoverable resources, including energy. Many municipalities have found that energy recovery reduces the cost of solid waste disposal. Energy recovery technology is complex and the equipment requires a steady supply of waste to operate efficiently. Because of the complicated technology, most energy recovery facilities have high capital costs and long payback periods. In order to remain cost effective throughout their lives, these energy recovery facilities require a guaranteed, steady supply of waste. Consequently, municipalities utilizing energy recovery facilities are usually required to enter long-term agreements to

provide the facilities with specific amounts of waste. In order to make these energy recovery facilities financially feasible, and thereby simultaneously improve the environmental impacts and the economics of municipal solid waste disposal, municipalities shall have the legal authority to control the handling of solid waste generated within their borders.

The purpose of this section is to promote the recovery of resources from solid waste by creating one of the conditions which make energy recovery economically feasible, assuring municipalities the authority to guarantee a steady supply of solid waste to specific waste facilities.

2. Flow control. Municipalities are expressly authorized to enact ordinances that control solid waste collection, its transportation or its delivery to a

specific facility, when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes. This authorization includes, but is not limited to, ordinances:

A. Requiring segregation of wastes; and

B. Requiring delivery of wastes generated within the municipality, or any portion of those wastes, to a designated disposal or reclamation facility.

3. Ordinances. This chapter shall not be construed as limiting the authority of any municipality to enact ordinances for the regulation of solid waste disposal, provided that these ordinances are not less stringent than or inconsistent with this chapter or the regulations adopted under this chapter.

4. Contracts. Municipalities may contract with any person for the collection, transportation, storage, processing, salvaging or disposal of wastes.

Sec. 2. 38 M.R.S.A. § 1305, subsection 2, as amended by P.L. 1979, c. 541, Pt. A, §277, is repealed.

Sec. 3. 38 M.R.S.A. § 1305, subsection 3, as enacted by P.L. 1973, c. 387, is repealed.

STATEMENT OF FACT

Energy recovery is the extraction and use of energy from solid waste. There are a number of ways to extract this energy, but the most common method is incinerating solid waste to produce hot water or steam. The hot water or steam is then sold to offset the cost of incineration.

Energy recovery technology is complex and the equipment requires a steady supply

of waste to operate efficiently. Because of the complicated technology, energy recovery facilities have high capital costs and long payback periods. In order to remain cost-effective throughout their lives, energy recovery facilities usually enter long-term agreements with waste suppliers in order to guarantee that they have a steady supply of waste. In most cases, these waste suppliers are municipalities.

Twenty-four municipalities have long-term contracts with Auburn's energy recovery facility which began operation in 1981. Several other groups of municipalities are actively working to develop similar facilities.

During the next 5 years, 120 to 150 municipalities will have to close solid waste disposal sites that have reached capacity or are causing environmental

damage. Over 50 of these municipalities may turn to energy recovery as their most cost-effective alternative. Landfill space is getting scarce and energy is expensive. Energy recovery can reduce the need for landfill space and provide a relatively inexpensive source of energy, if there is a large enough waste supply to support the facility and a reliable buyer for the energy produced.

In order to guarantee a steady waste supply, most energy recovery facilities require participating municipalities to enter long-term agreements to deliver a minimum amount of waste to the facility or pay a penalty if insufficient waste is delivered. This type of agreement is known as a "put or pay" contract. The municipality must deliver the waste, or pay for it anyway. In order to meet their contractual obligations, most of these

municipalities pass ordinances requiring waste generated within the municipality to be delivered to the facility with whom the municipality has the contract. These ordinances are often referred to as "flow control ordinances," because they control the flow of solid waste from its point of generation to its point of disposal.

Municipalities need the express authority to enforce this type of ordinance. Recent federal court decisions, such as City of Lafayette v. Louisiana Power and Light Company, 435 United States 389 (1978); California Retail Liquor Dealers Association v. Midcal Aluminum, Incorporated, 445 United States 97, 1980; Community Communications Company, Incorporated v. City of Boulder, 50 United States L.W. 4144, United States, January 13, 1982; and Hybud Equipment Corporation et al. v. City of Akron et

al., 654 F. 2d 1187, 1981, vacated, 50 United States L.W. 3667, United States, February 22, 1982, indicate that a state legislature must "clearly articulate and affirmatively express" a policy to promote energy recovery and authorize municipalities to control their solid waste flow before these ordinances can withstand judicial scrutiny. This bill establishes that policy and affirms that authority.

Section 1 enacts a new Title 38, section 1304-B, expressing the Legislature's intent to promote energy recovery and authorizing municipalities to guarantee delivery of their solid wastes to specific waste facilities.

(4)

No. 93-1133

Supreme Court, U.S.
FILED
FEB 28 1994
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

TOWN OF GRAY, and
REGIONAL WASTE SYSTEMS, INC.,
Petitioners,

v.

TRI-STATE RUBBISH, INC., and
RECYCLABLES UNLIMITED SERVICES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of the State of Maine

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Petitioners Town of Gray ("Gray") and Regional Waste Systems, Inc. ("RWS") file this Reply Brief to correct factual misstatements and respond to legal arguments included by Respondents in their Brief in Opposition to Petition for Writ of *Certiorari* ("Respondents' Brief").

Petitioners seek review of a question of law from the court of last resort in Maine, the Maine Supreme Judicial Court. That court, known as the Law Court, found that Gray's Solid Waste Flow Control and Recycling Ordinance (the "Ordinance") "has a discriminatory effect on interstate commerce by prohibiting waste that would otherwise be available for interstate trade from crossing the state line." Pet. App. at 6a.

Petitioners assert that as a matter of law, no discriminatory effect upon interstate commerce—as that phrase is construed in Commerce Clause jurisprudence—exists in this case. If this Court agrees that the Ordinance has no discriminatory effect on interstate commerce, the inquiry into this case should end and the Ordinance should be upheld. In the alternative, if this Court agrees that federalism or the Resource Conservation and Recovery Act of 1976 ("RCRA") authorizes the enactment and enforcement of the Ordinance so that the dormant Commerce Clause is inapplicable to this case, or that solid waste is not an article of interstate commerce, the Commerce Clause analysis should end and the Ordinance should be upheld.

If, however, this Court decides that the Ordinance has a discriminatory effect on interstate commerce, Petitioners assert that the appropriate legal test for weighing the legitimacy of the Ordinance is the test articulated in *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970). The content of the Law Court's opinion (as contrasted with its

holding), and particularly its comment that "Rather, Gray's Ordinance appears to pursue legitimate local goals by gaining control of the waste stream and promoting recycling and energy recovery" (Pet. App. at 6a), substantially supports the conclusion that the *Pike* test is the appropriate one to apply. The Law Court's conclusion that "Gray's Ordinance does not facially discriminate against out-of-state interests, and so it escapes *per se* invalidity" (Pet. App. at 6a) also militates for a finding that the balancing test articulated in *Pike* is the appropriate test.

It is critical that the Court accept review of this Petition and rule on the legal issue therein because confusion and a waste of judicial and municipal resources will otherwise result during remand proceedings.

ARGUMENT

I. RESPONDENTS' ARGUMENTS REST UPON SEVERAL MISSTATEMENTS OF FACT.

Respondents' Brief contains several factual misstatements which go to the core of the issues raised by the Petitioners, and which therefore require a response and clarification. Respondents' Brief at Page 3 states that commercial haulers are denied access to the Gray Transfer Station for delivery of recyclable materials. This question has been addressed several times during the course of this litigation. Gray and RWS repeatedly have stated that commercial haulers are not denied access to the Gray Transfer Station for delivery of recyclable materials; while they must deliver Acceptable Waste to the RWS waste-to-energy facility (the "Facility"), Respondents and other commercial haulers must, pursuant to Sections VII G and H of the Ordinance, deliver any recyclable materials they may collect to the Town at its Transfer Station. Pet. App. 24a and 62a. Respondents' statement is simply wrong.

Also at Page 3 of Respondents' Brief is the assertion that Gray and RWS have "ordered an embargo of all solid waste generated in Gray," and that "the commodities [solid waste] are quarantined." It is unclear what Respondents hope to gain by the misuse of the terms "embargo" and "quarantine." Gray has done nothing but direct the solid waste generated within its municipal borders to the appropriate solid waste management facilities. Petitioners are not attempting to insulate themselves from out-of-town or out-of-state waste; indeed, RWS has on occasion accepted out-of-state solid waste on the spot market. Thus, there is no "embargo" or "quarantine" in effect in this case.

In addition, Respondents' Brief contains several misstatements of the Law Court's decision in this action. For instance, Respondents' Brief states at Page 4 that the "Maine Supreme Judicial Court found correctly that the Ordinance is an impermissible interference with interstate commerce because it seeks to reserve a valuable commodity from trade for the exclusive use of RWS." Nowhere did the Law Court find that the Ordinance is an impermissible interference with interstate commerce. Any such finding presumably would have ended the Commerce Clause inquiry and with it, this litigation. Rather, the Law Court found that the Ordinance "has a discriminatory effect on interstate commerce by prohibiting waste that would otherwise be available for interstate trade from crossing the state line." Pet. App. at 6a. Moreover, the Law Court did not base its finding of discrimination on Petitioners' reserving any valuable commodity from trade. The Law Court acknowledged that solid waste is an "object" of interstate commerce, but stated nothing regarding any commodity or reserving such commodity. Pet. App. at 4a. This misstatement apparently seeks to implicate the line of Commerce Clause cases wherein states have reserved natural resources such as coal or oil from interstate trade, but this analysis does not apply to flow control ordinances.

In another instance of misstating the decisions below, Respondents' Brief states at Page 4 that Gray, under the Law Court's decision, must "demonstrate that the Ordinance was not adopted for economic protectionism and that there are no reasonable alternatives for the disposal of waste." Instead, the Law Court stated that "Gray and RWS must therefore show valid reasons for this Ordinance other than economic protectionism and must also show that reasonable alternatives *to the Ordinance* are unavailable." Pet. App. at 6a (emphasis added). Nowhere does the Law Court even suggest that Gray and RWS must show that there are no reasonable alternatives for the disposal of waste other than at the Facility.

II. RESPONDENTS' LEGAL ARGUMENTS MUST BE REJECTED.

Respondents argue that: (1) the Petition is premature because the Law Court's decision does not constitute a final judgment for purposes of review by this Court; (2) the Ordinance is facially discriminatory; (3) Petitioners did not raise the issue of federalism in the Maine courts; and (4) RCRA does not authorize the Ordinance nor was this issue raised below. Respondents' Brief at pp. 4-10. A brief response to these arguments follows.

A. The Issues Presented in the Petition are Appropriate for Review by this Court.

The Respondents incorrectly state that the Law Court's decision does not constitute a final judgment. As noted above, the Law Court is the Maine court of last resort and has rendered a final judgment regarding the federal constitutional law to be applied to this case on remand.

In addition, for two reasons, Respondents' reliance upon *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 460 (1975) as authority for their position is misplaced. One reason is that *Cox* is inapposite to the case at bar because it involved an appeal to the U.S. Supreme Court

under the former 42 U.S.C. § 1257(2) (repealed and replaced) rather than a petition for writ of *certiorari.*

The second reason is that if *Cox* is applicable to this action, the case at bar fits within three of the four categories of cases identified in *Cox* in which it has been held that there was a final judgment, despite the fact that further state court proceedings had been ordered. The *Cox* opinion concerned an appeal from a decision of the Georgia Supreme Court, which held that the trial court erred in holding that a Georgia rape shield statute extended a civil cause of action for invasion of privacy, but which also held that the complaint stated a cause of action for a common law tort and ordered the case remanded. 420 U.S. 469 at pp. 474-475. Holding in *Cox* that the decision from which the appeal had been taken was final, the Court continued to employ a practical, rather than technical, construction of finality, and identified four categories of cases "in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477.

Those four categories are as follows: (1) "those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained"; (2) those cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of further state court proceedings;" (3) those cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case;" and (4) those cases "where the federal issue has been finally decided in the state courts with further proceedings pending in which

the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Id.* at 482-483.

The Law Court's decision in this action fits within each of the first three categories of cases identified in *Cox*. As to the first category of cases, the Law Court has reviewed the dormant Commerce Clause jurisprudence and has held that the Ordinance "has a discriminatory effect on interstate commerce" and has placed the burden of proof on Petitioners. Thus, this Petition presents questions of federal constitutional law—whether the Law Court erred in holding the dormant Commerce Clause applicable, and even if it did not, whether it erred in placing the burden of proof on Petitioner and in its statement of that burden of proof. These are questions which the state court of last resort has decided in a manner that dictates the course of further proceedings. As to the second category of cases, to the extent that Petitioners still may be able to challenge the Law Court's decision regarding the applicability of the dormant Commerce Clause to this case and the burden of proof in any appeal from the remand proceedings, then the same federal constitutional issues once again will be presented to this Court. As to the third category of cases, the questions of the applicability of the dormant Commerce Clause to this case, and of the appropriate test thereunder if it is applied, may not survive the remand proceedings. The remand proceedings would occur in accordance with the Law Court's holdings that: (1) the dormant Commerce Clause jurisprudence is applicable and (2) Petitioners bear the burden of proof to show valid reasons for the Ordinance other than economic protectionism and that reasonable alternatives to the Ordinance are unavailable.

It may well be that the only appealable issue after proceedings on remand would be whether Petitioners met their burden of proof. In such an instance, the Law Court judgment must be held final or else the federal constitutional issues would escape review by this Court.

Finally, considerations of practicality dictate that the Law Court's decision be deemed a final judgment for purposes of review by this Court. Should this Court's pending decision in *Town of Clarkstown v. C&A Carbone, Inc.*, 587 N.Y.S. 2d 681 (1992) *cert. granted*, 126 L.W. 2d 369, 62 U.S.L.W. 3334 not decide the issue presented here, and should Petitioners proceed to trial without the issue presented here being addressed by this Court, Petitioners will be forced to expend public resources and consume a great amount of the Maine judiciary's time to offer proof regarding what may well be the wrong legal standard.

B. The Gray Ordinance Is Neither Discriminatory On Its Face Nor Should It Be Reviewed Under The "Strict Scrutiny" Standard.

Petitioners stand by the arguments raised at pages 22-27 of the Petition in this regard, and will not repeat those arguments here. Petitioners simply wish to take exception with two of the statements contained in Respondents' Brief at pages 6 and 7.

First, while Respondents argue that the Ordinance is facially discriminatory, their statement that both state courts in this proceeding have made such a finding is wholly erroneous. Respondents state, without any record support, that "The findings by the trial court completely describe the nature of the intrusion upon interstate commerce and concede that the Ordinance is facially discriminatory. The Maine Supreme Court. therefore, affirmed the findings of fact by the trial court." Respondents' Brief at p. 7. What the trial court actually found was that the Ordinance had "some effect on interstate

commerce. But I can't imagine that what the Town is doing is having such an effect on interstate commerce that is violates applicable constitutional standards." Pet. App. at 39a. That finding does not, under any reasonable interpretation, rise to the level of facial, or *per se*, discrimination as claimed by Respondents. Indeed, the trial court's upholding of the Ordinance against Respondents' Commerce Clause challenge evidences an application of the *Pike v. Bruce Church, Inc.* balancing test. *See* Pet. App. at 38a-39a. Moreover, the Law Court specifically held that "Gray's Ordinance does not facially discriminate against out-of-state interests, and so it escapes *per se* invalidity." Pet. App. at 6a. Thus, while Respondents may argue that the Ordinance facially discriminates against interstate commerce, they egregiously misstate the findings of the courts below in even suggesting that those courts found the Ordinance facially discriminatory.

Second, Respondents' Brief at Page 7 discusses the concept of hoarding of raw materials with regard to Commerce Clause jurisprudence. Nowhere, either at the trial court level or before the Law Court, was there any finding or discussion of the hoarding of raw materials. Again, these phrases seek to invoke Commerce Clause jurisprudence regarding raw materials such as coal or oil where states have improperly sought to exclude the importation of refined products from other states or have sought to restrict the raw material for processing at in-state facilities. This analysis is irrelevant to the issue of a municipality performing the local police power function of solid waste management.

C. The Petition Properly Raises The Issues Of Federlism, RCRA And The Inapplicability Of The Dormant Commerce Clause To The Gray Ordinance.

Respondents argue that Gray and RWS are not permitted to advance a federalism argument or to argue that RCRA authorizes the Ordinance. Respondents' Brief

at pp. 4, 8-10. Contrary to Respondents' representations, however, these arguments do not constitute a new cause of action or theory for relief.[1] Rather, these arguments are additional ways of stating the inapplicability of dormant Commerce Clause jurisprudence to the Ordinance. In this regard, *Cardinale v. State of Louisiana*, 394 U.S. 437 (1969) cited by Respondents, is inapplicable. In *Cardinale*, the U.S. Supreme Court found that the sole federal question had never been raised, preserved or passed upon in the state courts below, and therefore dismissed the Petition for a Writ of *Certiorari* for lack of jurisdiction. Here, by contrast, the federalism and RCRA arguments do not raise new questions of law; the issue of the Ordinance's validity under the Commerce Clause was raised by Respondents at the inception of this litigation and *Cardinale* is therefore inapposite. Moreover, the federalism and RCRA arguments raised by Petitioners

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[1] Respondents argue that the federalism issue "would necessarily involve an examination of the congressional intent to displace interstate commerce," and would have resulted in "extensive dialogue regarding conflicting policy goals," if it had been raised below, and so cannot be raised now. Respondents' Brief at pp. 8-9. However, all parties will have the opportunity to present and argue congressional intent on this issue if the Court grants the instant Petition. Respondents also argue that issues such as residual ash disposal and air quality would have been raised by it below. Respondents' Brief at p. 7. However, there has been no evidence or discussion of residual incinerator ash or air quality with regard to the legal or factual issues in this case, and many of Respondents' contentions are wrong. For example, the ash from the RWS facility currently goes to a specially designed and constructed ash landfill and is not simply "dumped in a landfill". In addition, the State of Maine has developed a comprehensive waste management plan and is investing a considerable amount of money siting and building a special waste landfill to accommodate ash from waste-to-energy facilities in the future. Moreover, in addition to the absence of any evidence in the record of waste-to-energy facilities causing air pollution and the irrelevance of this discussion to the legal issue before this Court, RWS is a facility that is licensed by the State and is currently in compliance with all federal and State air quality laws.

involve questions of federal law, rather than the state law question belatedly raised in *Cardinale*.

Finally, as to the merits of Petitioners' federalism and RCRA arguments, Petitioners rely on the arguments in this regard contained in their Petition at Pages 15-22. In answer to Respondents' specific contention that waste-to-energy facilities can be financed solely upon a pledge of the full faith and credit of the participating municipalities, Petitioners assert that the Waste Handling Agreements' requirement that each RWS Member Municipality both enact a flow control ordinance *and* pledge its full faith and credit for payment of tipping fees reflects the reality of lending requirements for the RWS Facility and presumably for other similar facilities.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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